United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

Original w/ Affidavit of Mailing

75-2088

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2088

MEIR KAHANE,
Petitioner-Appellee,

—against—

UNITED STATES OF AMERICA,
Respondent-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—against—

MEIR KAHANE,
Defendant-Appellee.

APPELLANT'S APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

UNITED STATES COURT OF APPEALS
FILED
AUG 4 1975
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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DEC OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N/S	O	R	R 23	DEMAND S	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
207-1	75	C 324	04	25	75	2	510	1		CLOSED			0715	WEINSTEIN, J		

PLAINTIFFS

MEIR KAHANE

DEFENDANTS

UNITED STATES OF AMERICA

28 U.S.C. 2255

(Related Case 71-CR-479)

CAUSE

ATTORNEYS

BARRY IVAN SLOTNICK,ESQ.
233 Broadway, N.Y.,N.Y.
Tel: 233-5390

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	DATE	FILING FEES PAID RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
				JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

75 C 324 MEIR KAHANE vs. U.S.A.

DATE	NR.	PROCEEDINGS
4-25-75		APPLICATION FILED PURSUANT TO 28 U.S.C.A. 2255 (Related Case 71-CR-479) (1)
4-25-75		Affidavit of THOMAS R. PATTISON, filed in response to petitioner's motion. (2)
4-29-75		Memorandum filed in opposition to motion re Kosher Food for defendant, etc. (3)
4-30-75		Copy of letter of Thomas R. Pattison, Assistant U.S.Atty., Deputy Chief, General Crimes Section, addressed to Barry Ivan Slotnixk, Esq., 233 Bway., N.Y.' etc. (4)
5-7-75		MEMORANDUM and ORDER FILED. STAY VACATED. KOSHER FOOD TO BE PROVIDED. (5)
5-9-75		Letter of Rabbi Moses David Tendler, Ph., D.. dated April 7, 1975 filed. (6)
5-6-75		NOTICE OF APPEAL FILED. (7)
5-6-75		Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A.
5-6-76		Instructions re appeal, together with forms C and D were on this day handed to Assistant U.S.Atty.
6-26-75		Copy of order rec'dfrom USCA and filed. Ordered that the record on appea be filed on or before July 18, 1975, etc. (8)
7-15-75		All documents together with Certified Copy of Docket Entries were on this day transmitted to Clerk, U.S.C.A.
7-19-75		Copy of Index filed with acknowledgment endorsed thereon by Clerk, U.S.C.A., re documents received by that court, etc. (9)

APPEAL
CRIMINAL DOCKET

71CR 479

71-1403 71C-622

WEINSTEIN, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	
CHAIM BIEBER, STEWART COHEN, JOHN DOE a/k/a Dov, EILEEN GARFINKLE, AVRAHAM HERSHKOVITZ, NANCY HERSHKOVITZ, JOSHUA JOFFE, a/k/a/ Joshau Weiss, MEIR KAHANE, RUSSELL KELLNER, DAVID SOMMER, SANDOR "alex" STERNBERG and MORTON WINNER	For Defendant: Kahane Reuben B. Gross- 30 Bay St. Staten Island, N.Y.

conspiracy to make, receive and possess incendiary dev

ABSTRACT OF COSTS	AMOUNT
Fine, KAHANE pd	5000 -
Clerk, BIEBER pd	2500 -
Marshal, COHEN pd	500 -
Attorney,	
Commissioner's Court,	
Witnesses,	

1099

CASH RECEIVED AND DISBURSED				
DATE	NAME	RECEIVED	DISBURSED	
11-18-71	Pd Stape { Kahane	5000 -		
11-19-71	Pd. Treas {		5000 -	
11-24-71	Pd Treas { Bieber	2500 -		
11-26-71	Pd Treas {		2500 -	
11-24-71	Pd Treas { Cohen	500 -		
11-26-71	Pd Treas {		500 -	
3-3-72	Notice of Appeal { Kahane	5 -		
3-4-72	Paid to Treas		5 -	
6/6/75	Govt's notice of appeal (KAHANE)			
6-23-75	Certified Copies { Kahane	5 -		
6-24-75	Mailed to Treas	0	5 -	

DATE	PROCEEDINGS
5-12-71	Before WEINSTEIN, J- Sealed Indictment ordered filed. Bench Warrants ordered and issued as to all defts.
5-13-71	Before WEINSTEIN, J- Sealed indictment ordered open.(On motion of USA Keaher) Referred to Magistrate.
5-13-71	Before SCHIFFMAN, Magistrate - Case called-Defts. BIEBER, GARFINKLE, KAHANE, SOMMER, STERNBERG & MORTON WINNER, produced in court on Bench Warrants - Counsels Barry Ivan Slotnick, Bertram Zweibon and Simeon Soterokis present (representing all 6 defts) Bail set for deft BIEBER - Deft O.R. subject to whether deft makes bail in 71 CR-480 ($10,000 Surety- same bail limits as 71CR-480. Bail set for Eileen Garfinkle - $10,000 Personal Rocognizance Bond Bond -Bail limits to include State of New York. Bail set for Meier Kahane - O .R. subject to deft making bail in 71 CR-480.($25,000 Surety0 Same bail limits as 71 CR-480. Bail set for deft SSOMMER-

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DATE	PROCEEDINGS
	$10,000 personal recognizance Bond - Bail limits to include the State of New York. Bail set for deft STERNBERG - $10,000 Personal Recognizance Bond Bail limits to include State of N.Y. Bail set for deft. WINNER -$10,000 Personal Recognizance Bond - Bail limits to include the State of New York and Philadelphia, Pa. All defts must return to District Court on May 27, 1971 for pleading.
5-14-71	Before SCHIFFMAN, Mag,- Case referred by Honorable Jack B. Weinstein to U.S. Magistrate Max Schiffman to set bail and date for pleading- Case called- Bail set as to deft Cohen at $10,000.00 Personal Recognizance- Bail limits to include continental U.S. U.S. passport Agency to be notified of bail limits of deft. Date for pleading set for May 27, 1971 at 10AM. Deft and counsel Barry Slotnick present.
5-17-71	Magistrates Records 71 M 708 and 709 inserted in criminal file.
5-19-71	Magistrates Records 71 M 713, 724 and 712 inserted in crim. file.
5-19-71	Before WEINSTEIN J - Application by defts. KAHANE & CALDERON to extend bail limits ~~as~~ to Canada for both defts. is granted.
5-27-71	Before WEINSTEIN,J- Case called- Defts and counsel present. Deft Joffe reported a fugitive. Defts arraigned and enter pleas of not guilty. Bail contd as ~~to~~ all defts. Bail limits entended as to deft Garfinkle for entire U.S. same as for deft Winner. Legal Aid appointed as counsel for deft Cohen and Allen Lashley for deft Garfinkle. Orders signed.
5-27-71	By WEINSTEIN, J- Order appointing counsel as to deft Cohen /Filed.
5-27-71	By WEINSTEIN,J- Order appointing counsel as to deft Garfinkle filed.
5-27-71	Dqfts present were: Chaim Bieber, Stewart Cohen, Eileen Garfinkle, Meir Kahane, David Sommer, Alex Sternberg and Morton Winner.
5-28-71	Copy of order for pre trial conference set for June 4,1971 mailed to all defendants and attorneys by special delivery.
5-28-71	By WEINSTEIN, J.-Order filed setting case for Pre-trial on 6-4-71.
6-3-71	Before WEINSTEIN, J.-Case called-Deft. present w/o counsel-Court enters a plea of not guilty.
6-4-71	Before WEINSTEIN, J.-Case called-Pre-Trial conference held and concluded-Ca to be tried immediately after 71-CR-480-Deft. Kellner arraigned and enters of not guilty-Bail cont'd.
6-4-71	Notice of Appearance Filed as to Defts. Kahane,Winner,and Bieber.
6-7-71	Deft. Kahane's notice of Motion for discovery and dismissal of indictment Filed(Judge Weinstein to assign date and time).
6-11-71	Before WEINSTEIN,J .-Case called-Deft Hershkovitz present-Attys Lewyin, Slot

(over)

DATE	PROCEEDINGS
7-1-71	Motion for Examination & Copying filed.
7-1-71	Copy of telegram sent by AUSA Pattison to deft Eileen Garfinkle filed.
7-1-71	Stenographers transcript dated June 25, 1971 pgs 1-10
7-6-71	Before WEINSTEIN,J- Case called-defts and counsel present. Defts motion to suppress- hearing ordered and begun- court orders all logs from date of indictment turned over to defts. Hearing contd to July 7, 1971 at 2PM.
7-7-71	Before WEINSTEIN,J- Case called- defts except for Nancy Hershkovitz and Joshua Joffe, who are reported as fugitives,present with counsel. Hearing resumed. Hearing contd to July 8, 1971 at 11AM.
7/8/71	Before Weinstein, J.-Case Called-Defts. & counsel present-Hearing resumed & cont;d to 7/9/71 at 10:30 A.M.
7/9/71	Before Weinstein,J.-Case Called-Defts. & counsel present-Deft. KAHANE withdraws his plea of not guilty and having been advised of his rights by the Court & on his own behalf enters a plea of guilty as charged-Deft. BIEBER withdraws his plea of not guilty and having been advised of his rights by the Court & on his own behalf enters a plea of guilty as charged-Deft. COHEN withdraws his plea of not guilty and after being advised of his rights by the Court & on his own behalf enters a Plea of guilty as charged-Sentences adj'd to 7/23/71 at 9:30 am-Hearing concluded.
7/9/71	By Weinstein, J.-Order appointing counsel filed. (STERNBERG)
7-14-71	2 stenographers transcripts filed (pages 313 to 351a)
7-23-71	Before Weinstein J - Case called - Defts & counsels present. on Motion of Asst US Atty Ryan the Indictment is dismissed as to defts.JOHN DOE, GARFINKLE, AVRAHAM & NANCY HERSHKOVITZ, JAFFE, KELLNER, SOMMER, STERNBERG & MORTON WINNER.
7-23-71	By Weinstein J - Order of dismissal filed as to above defts.
7-23-71	Before Weinstein J - Case called - Defts BIEBER, COHEN & KAHANE present with counsels - Deft BIEBER sentenced to 3 years imprisonment - execution of sentence is suspended and the deft is placed on probation for 3 years. Deft is fined $2,500 and stay for payment of fine is granted for 120 days. Special condition of probation as to all 3 defts is that defts are to have nothing to do with guns, bombs, dynamite, gun powder, fuses, molotov cocktails, clubs or any other weapons. Deft COHEN sentenced to 3 years probation for the duration of his minority under the Y.C.A. pursuant to T-18, USC. Sec. 5010(a) and fined $500 -stay is granted for 120 days for payment of fine. Deft KAHANE sentenced to imprisonment for 5 years. Execution of sentence is suspended and deft is placed on probation for five years. Deft is to pay a fine of $5,000.00. Stay for 120 days is gran

DATE	PROCEEDINGS
	and Zweibaum present-Notice of Appearance by Lewin to be filed as atty for deft. Hershkovitz.
6-11-71	Notice of Appearance of atty. Nathan Lewin for deft. Hershkovitz Filed.
6-18-71	Before Weinstein J - Case called - Defts motion for Govt to produce, etc. - Govt documents ordered sealed and marked as Govt.Ex#1 Govt ordered to provide defts with Govt Ex #1 for their examination Govt given until June 25, 1971 at 9:30 am to respond-
6-18-71	Notice of Motion filed for Inspection of Grand Jury Minutes dismissal of indictments, etc. Bill of Particulars, etc.
6-18-71	Opposition to motion of defts and Memorandum of Points and Authorities filed.(By the Govt)
6-24-71	Stenographers transcript dated June 18, 1971 filed.
6-24-71	Motion to suppress filed (ret June 25, 1971) Motion to dismiss etc. (ret June 25, 1971)
6-25-71	Before WEINSTEIN, J.- Case called- government's application for a one week adjournment is granted. Motions adjd to July 6, 1971 at 10AM.
6-28-71	Govt's objection to motion for disclosure filed as to all defts.
6-28-71	Govt's objection to deft's Calderon omnibus motion filed.
6-28-71	Govt's objection to motion for pre-trial production of Grand Jry testimo of Gilbert Laurie filed.
6-28-71	Govt's response to motion to strike matter as surplusage filed
6-28-71	~~Govt's Bill of Particulars filed.~~
6-28-71	Govt's Memorandum of Law in response to defts' motion to dismiss the indictment upon fifth amendment grounds filed.
6-30-71	Motion for a Protective Order by the Govt filed.
6-30-71	By Weinstein J - Order filed that on July 6, 1971 at 10:00 am all parties shall be prepared to go forward with evidence on the issue of illegality of the wiretaps. If the Court should determine that the wiretaps were illegal, the parties shall be prepared at that time to go forward on the question of evidence obtained after the wiretaps. Defts shall be present.
6-30-71	By Weinstein J - Ordered that the defts & their counsel may not divulge the contents of any of the above-mentioned written summaries to any person without securing the prior approval of this court and that upon the completion of the legal proceedings in this case the said summaries will be returned to the attys for the U.S.A.
6-30-71	By WEINSTEIN, J- Telegraphic message to all attys filed.

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DATE	PROCEEDINGS
5-2-72	Before WEINSTEIN J - Case called - hearing on violation of Probation (Meier Kahane) Deft present with counsel Barry Slotnick - Hearing held and concluded - court finds the deft guilty of violating of probation - deft continued on probation as indicated by the Court - each party to submit order within a week.
5-3-72	Letter of 2-4-72 filed received from Chambers of Judge Weinstein.
5-15-72	By WEINSTEIN, J. - Order filed as toMEIR KAHANE that special conditions of probation be modified concerning meetings, guns, JDL (see order).
8-16-72	Stenographer's transcript dated 6-4-71 filed in 71CR-480.
5/24/73	Letter dated 5/22/73 filed from deft WINNER re: motion for expungement of record
5/24/73	By WEINSTEIN, J.- Order filed, that U.S. Atty will submit an appropréate order re: expungemnt .
8-10-73	By WEINSTEIN J - Order filed that the Govt return to Dr. Morton Winner any and all photographic and fingerprint material taken as a result of his arrest of May 13, 1971, by the U.S. Treasury Dept. Bureau of Alcohol, Tobacco & Firearms and/or the U.S.Marshal Service and that the record of his arrest be expunged.
8/20/73	Order for return of photographic and fingerprint material etc. Retd and filed- executed
11-13-73	Letter dated Nov. 12, 1973 filed from Reuben Gross, counsel for deft Kahane, received from Chambers re appointment, etc.
11-13-73	By WEINSTEIN J - Order filed that the matter is to be heard on Nov. 21 at 10:00 AM. Since this is a crimina matter a reporter and a representative of probation shall be present. Parties informed. (see entry of Order on front of letter from counsel Reuben Gross dated Nov. 12, 1973.)
11-21-73	Before WEINSTEIN,J.- Case called- Deft not present- Counsel present- Deft motion for termination of probation or to be able to return to this coun argued- Court recommends that the deft deft take up matter first with Probation department and the U.S. Attorney- So Ordered
12-4-73	By WEINSTEIN,J.- Order to Show Cause why upon receipt of probation depar report that a further order should not be made terminating this proceedin against the deft, etc. Ret. 12-19-73 at 9:45 A.M. (KAHANA) Filed
12-12-73	Govts affidavit in opposition filed (re consent to change atty for deft Kahane)
12-19-73	Before WEINSTEIN,J.- Case called- Deft not present- Counsel present- Motion adj'd to 1-2-74 at 9:30 A.M.- Counsel to obtain formal authorization to be

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DATE	PROCEEDINGS
	granted for payment of fine.
7-23-71	Judgment & Order of Probation filed for defts. BIEBER, COHEN AND KAHANE. Certified copies to Probation.
7-23-71	Affidavitsof David Sommer, Stewart Cohen, Eileen Garfinkle, Morton Winner, Chaim Bieber, Meier Kahane, Kellner , Abraham Hershkovitz & Sandor Sternberg., filed.
7-23-71	By WEINSTEIN J - Memorandum and Order filed as to sentence as to all defts filed.
8-2-71	By MISHLER, J.-Order appointing counsel filed and voucher mailed for compensation of appointed counsel.
8-9-71	Letter dated 7-28-71 to Judge Weinstein in re to remove certain pages etc. Motion denied without prejudice to an application U.S.A. vs Hershkovitz It is so Ordered on back of letter.(copies mailed to attys)
8-9-71	Letter dated 8-4-71 to Judge Weinstein filed
8-6-71	Letter of July 30, 1971 filed (received from Chambers of Judge Weinstein from counsel for deft COHEN, Simon Chrein of Legal Aid) for permission to continue his employment at Camp Jedel etc)
8-6-71	By Weinstein J - Order filed that motion is denied . Any application of this type must be made on notice to the Govt and the Probation Office. Mr. Chrein, US Atty and Probation notified) See entry on front of letter of July 30, 1971 etc)
8-10-71	2 Stenographers transcripts filed (Hayes 1, 80 3/17)
8-16-71	Voucher for compensation filed. (Garfinkel)
8-20-71	Stenographers Transcript dtd 7/23/71 filed
9-1-71	Copy of letter from Nathan Dershowitz to AUSA Patterson dtd 08-12-71 filed. (received from AUSA office)
9-22-71	Voucher for compensation filed. (Cohen)
10-14-71	Voucher for compensation and expenses of appointed counsel filed (deft. Alex Sternberg - in the amount of $1000 approved by Weinstein,J)
11-1-71	Satisfaction of Fine judgment filed (KAHANE)
11-29-71	Satisfaction of Fine judgment filed (Bieber)
11-29-71	Satisfaction of Fine judgment filed (Cohen)
3-21-72	By WEINSTEIN J - order filed setting hearing down for April 10,1972 at 2:00 P.M. (attys notified and copy of charges mailed to attys)
4/4/72	Before Weinstein,J.-Case called-Deft (KAHANE) not present counsel present-Application to adjourn hearing on violation of probation to 5/2/72 granted.

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DATE	PROCEEDINGS
2-14-75	Letter filed dated 2-11-75 received from Chambers from Barry Ivan Slotnick,Esq. counsel for deft Kahane , for attending court on 2-18-75 at 9:30 am etc. So Ordered by Judge Weinstein (see bottom of letter from counsel for Judges notation)
2-18-75	Before WEINSTEIN J - case called - deft Kahane not present - defts motion to suppress set for hearing Feb. 21, 1975 at 9:30 am. counsel Barry Slotnick present. defts motion to serve subpoenas on the Sec. of State/and John Scali is denied.
2-18-75	Notice of Motion filed, ret. 2-21-75, for abating proceedings,Inspection, Bill of Particulars, and for suppressing evidence.
2-21-75	Before WEINSTEIN J - case called - deft KAHANE & counsel Barry Ivan Slotnich present - hearing ordered for violation of probation begun - defts motion to enjoin and abate these proceedings is denied - Govt directed to continue its search - defts application for a stay is denied - Govt rests - defts motion to dismiss the charge of violation of probation is denied - deft rests - hearing concluded - Court finds the deft guilty of violation of probation - deft is sentenced to imprisonment of one year-stay of execution of sentence granted to Feb. 26, 1975 at 9:30 am. deft restricted to New York City, Nassau & Suffolk Counties.
2-21-75	Judgment and Order of Probation filed - certified copies to Marshal (MEIR KAHANE)
2/21/75	Govt brief filed
2/25/75	Memorandum of deft Kahane filed
2-26-75	Before WEINSTEIN J - case called - deft KAHANE & counsel Barry Ivan Slotnick present - defts motion for stay of execution of sentence to March 18, 1975 - no opposition - motion granted - the deft is granted leave to extend bail limits for purposes of making speeches as indicated- deft to surrender March 18, 1975 at 10:00 A.M.
2/27/75	Stenographers Transcripts dated 2/21/75 adn 2/26/75 filed
[illegible]	[illegible] in Support of Rabbi Mayer Kahane filed.
3/3/75	NOTICE OF APPEAL FILED.
3/3/75	Duplicate of Notice of Appeal and docket entries mailed to the C. of A.
3/5/75	Copy of letter dated 2/25/75 filed from A. Norton to Mr. Trager
3-17-75	Before WEINSTEIN J - case called - deft not present - counsel Barry Slotnick present - deft to surrender March 18, 1975 at 10:00 A.M. deft to serve at a community treatment center until April 4, 1975. Court recommends Allenwood,Pa. for service of sentence.
3-17-75	Amended Judgment & Commitment filed - Certified copies to Marshal and Probation (see Judgment for details)

DATE	PROCEEDINGS
	substituted as deft's counsel (Kahane)
1-2-74	Before WEINSTEIN,J.- Case called on order to show cause pursuant to 18 U.S.C.A. 3653 directing the probation officer to present his report etc. and adjd to 1-9-74 (MEIR KAHANA)
1-2-74	Memorandum to Chambers from probation department re:Meir Kahane's and his request for an early termination from supervision, etc.
1-2-74	By WEINSTEIN,J.- Order filed that clerk will file the above probation report and send a copy to the U.S. Attorney and the attorney for the probationer (see order on page 2 of above probation memorandum)
1-10-74	Before WEINSTEIN,J.- Case called- Deft not present- Counsel present Order of substitution signed- Deft's motion to be released from probation argued and contd to 2-11-74 at 9:45 A.M. (KAHANE)
1-10-74	By WEINSTEIN,J.- Order filed that Reuben E. Gross, esq. be substituted as counsel for deft Kahane in place of Barry Slotnick
1-18-74	Memorandum to Chambers from Probation filed re:Stewart Cohen and possi violation of Probation- Order of Judge Weinstein located on bottom of memorandum filed that the matter should be set down for a prompt hearing, etc.
1-18-74	Memorandur to Chambers from Probation filed re:deft Cohen and suggestion that a hearing for violation of probation will not be necessary-
1-18-74	By WEINSTEIN,J.- Order filed that based upon assurances in above memorandum the order for a hearing is cancelled (see order on bottom of above memorandum)
2-4-74	Letter to Chambers from Reuben Gross, Esq. that leave to withdraw the application pending in the above matter without prejudice is requested Filed (KAHANE)
2-4-74	By WEINSTEIN,J.- So Ordered that above request is granted (Order dated 2-1-74 and located on bottom of above letter (KAHANE)
2/11/74	Deft present Case called Reuben Gross Withdrawn (Kahane)
2-25-74	By WEINSTEIN J - Order filed terminating probation (COHEN)
2-25-74	By WEINSTEIN J - Certificate of Vacation of Conviction filed(COHEN)
12/5/74	By WEINSTEIN,J.- Report and Order terminating probation filed (BIEBER)
2-7-75	Probation report filed re deft Kahane (received from Chambers)
2-7-75	By WEINSTEIN J - Order filed that Clerk will notify parties as indicated that a hearing will be held on 2-14-75 at 9:30 am. The deft will be present . The attys shall exchange names of witnesses and mark documents before the Clerk on 2-14-75 at 10:00 AM. (parties notified) See Order on page 1 of probation violation report.

DATE	PROCEEDINGS
4-16-75	Deft Kahane's supplemental memorandum of law filed.
4/16/75	Stenographers Transcript dated 4/4/75 filed
4-16-75	By WEINSTEIN J- Writ Issued, ret. 4-21-75 at 9:30 am.
4-17-75	Letter from Matthew Walsh, Center Complex Director of the Community Treatment Center, dated 4-16-75 with enclosure and the court's response dated 4-17-75 together with Judge Weinstein's Memorandum dated April 17, 1975 filed (all received from Chambers and placed in criminal folder)
4-17-75	Letter of 4-15-75 filed received from Chambers from Dennis Rapps,Exec. Director of National Jewish Comm. on Law & Public Affairs.
4-18-75	Letter filed dated 4-18-75 to Hon.Jack B.Weinstein, with attachments from U.S. Attorney David Trager.
4/18/75	Letter to chambers from Barry Slotnick, esq. and accompanying commentaries filed
4/18/75	~~Letter from David Trager to chambers dated 4/18/75 and accompanying copy of motion filed~~
4-18-75	Before WEINSTEIN J -- case called - deft Kahane not present - counsel Barry Slotnick present - Govts motion to vacate the sentence order because of lack of jurisdiction - motion argued and contd to 4-24-75 at 10:00 am. Briefs to be submitted by 4-23-75.
4-22-75	Letter filed received from Chambers from an inmate, Herman Max Ruth, with regard to kosher food, etc.
4-22-75	By Weinstein, J Writ of Habeas Corpus Ad Prosequendum filed, ret. 4-24-75 (Kahane)
4/24/75	Copy Letter to Herman Roth from Law Clerk to Judge Weinstein and accompanying letter from Mr. Roth filed
4/24/75	Before WEINSTEIN,J.- Case called- Deft KAHANE and counsel Barry Slotnick present-Hearing ordered and begun for purposes of recommendation-Deft rest Deft's request to be served kosher food while in prison-Deft to file 2255 motion-Govt to submit brief by 4/25/75-deft to submit brief by 4/28/75- deft's motion for modification of sentence- decision reserved-Govt's motio to vacate sentence order-decision reserved-Hearing concluded-decision rese
5/7/75	By WEINSTEIN,J.- Memorandum and Order filed as to above hearing and civil 2255 motion(order filed in civil file)
5/29/75	Stenographers Transcripts dated 4/24/75 filed
6/6/75	Govt's notice of appeal from order of 5/7/75 filed(KAHANE)
6/6/75	Docket entries and duplicate of notice of appeal mailed to court of appeals
6-13-75	Notice of Motion for reduction of sentence imposed filed (received from Chambers) deft Kahane

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DATE	PROCEEDINGS
3-19-75	Stenographers transcript filed dated Mar. 17, 1975.
3-19-75	Certified copy of Amended Commitment violation of probation returned and filed - deft Kahane delivered to Federal Det. Headquarters.
3-21-75	Stipulation filed and agreed by and between the deft.(Kahane) his counsel, Barry Ivan Slotnick, and the US Atty for the Eastern District of NY by Asst. U.S. Atty Thomas Pattison, that the Notice of Appeal filed on behalf of deft Kahane on Mar.3. 1975 be withdrawn and all appellate proceedings be abated herein.(Stipulation dated Mar. 13, 1975 but filed and recvd in Clerks Office on Mar. 21, 1975)
3-24-75	Telegram from Kahane family filed (received from Chambers and copy of telegram from Judge Weinstein to Rabbi Charles Kahane filed.
3-25-75	Copy filed of recent communications from the Dept. of Justice, etc. re deft Kahane (received from Chambers)
3-25-75	By WEINSTEIN J -Order filed that the deft Meir Kahane be granted leave to depart the jurisdiction of this court to commence a furlough from his present place of incarceration for religious reasons commencing with Mar. 26. 1975 on or before 10:00 am and continuing until the 29th day of Mar. 1975 on or before 10:00 PM at which time he shall be returned to custody etc. and it is further Ordered that the deft ~~surrender himself to Allenwood, Pa. (Federal Correctional Institution) on Monday April 7 1975~~ be granted a second furlough for religious purposes which furlough shall commence on or before noon on April 1.1975 and terminate on or before 10:00 PM on the 3rd day of Apr.1975 at which time he shall be returned back to his place of confinement and further Ordered that deft Kahane surrender himself at Allenwood,Pa. on Monday, April 7, 1975: and further Ordered that the deft shall render himself amenable to the further orders and process of this court, during said periods of furlough.
4-4-75	By WEINSTEIN J - Order filed until further order of the court the deft (Kahane) will be kept at a community treatment center in New York City, being allowed out to eat meals and attend religious services (see Judges notation on bottom of amended commitment form)
4-14-75	Notice of Motion filed and Memorandum in support of motion for an order providing deft Kahane for kosher food etc.

D. C. 102

71 CR 479
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DATE	PROCEEDINGS
6/17/75	Before WEINSTEIN,J. - Case called- Deft KAHANE not present-counsel present-Deft's motion for reduction of sentence denied-deft to submit order
6/18/75	Stenographers Transcript dated 6/17/75 filed
6-19-75	By WEINSTEIN J - Order filed that deft Kahane's motion under Rule 35 be denied on the independent ground that this court has no power to consider the instant motion during the pending of the Govts appeal pursuant to a Notice of Appeal filed on 6-6-75 in related case 75 C-624; and further the court finds that Rule 35 is not applicable to a sentence rendered as a result of a finding of probation violation. (Order dated 6-17-75 but received in Clerks Office on 6-19-75)
6/20/75	Letter to chambers from A.U.S.A. Pattison and accompanying letter to A.U.S.A. Pattison from Matthew Walsh(C.T.C.) filed
6-23-75	ORDER received from the C of A that Record be docketed on or beforeJuly 18, 1975(Kahane)
6/23/75	Notice of appeal from denial of Rule 35 motion filed
6/23/75	Docket entries and duplicate of notice of appeal mailed to court of appeals (KAHANE)
7-1-75	Stenographers transcript filed dated 4-24-75.
7/15/75	Record on appeal certified and mailed to court of appeals
7-21-75	Acknowledgment received from the Court of Appeals for receipt of Record on appeal.
7/24/75	Letter from Probation Officer Bigger and accompanying newspaper article filed

D. C. 109

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

- against -

CHAIM BIEDER, STEWART COHEN, JOHN DOE, also known as "Dov", EILEEN GARFINKEL, AVRAHAM HERSHKOVITZ, NANCY HERSHKOVITZ, JOSHUA JOFFE, also known as Joshua Weiss, MEIR KAHANE, RUSSELL KELLNER, DAVID SOMMER, SANDOR "ALEX" STERNBERG, and MORTON WINNER,

Defendants.

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INDICTMENT

Cr. No. _____
(18 U. S. C., §371)

THE GRAND JURY CHARGES:

From on or about the 31st day of May 1970 and continuing until on or about the 29th day of September 1970, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant CHAIM BIEDER, the defendant STEWART COHEN, the defendant JOHN DOE, also known as "Dov", the defendant EILEEN GARFINKEL, the defendant AVRAHAM HERSHKOVITZ, the defendant NANCY HERSHKOVITZ, the defendant JOSHUA JOFFE, also known as Joshua Weiss, the defendant MEIR KAHANE, the defendant RUSSELL KELLNER, the defendant DAVID SOMMER, the defendant SANDOR "ALEX" STERNBERG, the defendant MORTON WINNER, and one Gilbert Laurie, named herein as a co-conspirator, but not as a co-defendant did knowingly, wilfully and unlawfully conspire to commit offenses against the United States; to wit, to make, receive and possess explosive bombs, incendiary devices, pipe bombs and other destructive devices as defined by Title 26 United States Code, Section 5845(a) and (f), without complying with the provisions of Title 26 United States Code, Section 5861(c)(d) and (f), Title 26 United States Code, Section 5821, Title 26 United States Code,

Section 5822, Title 26 United States Code, Section 5841, and Title 26 United States Code, Section 5871, in violation of Title 18 United States Code, Section 371.

It was a part of said conspiracy that the defendant CHAIM BIEBER, the defendant STEWART COHEN, the defendant JOHN DOE, also known as "Dov", the defendant EILEEN GARFINKLE, the defendant AVRAHAM HERSHKOVITZ, the defendant NANCY HERSHKOVITZ, the defendant JOSHUA JOFFE, also known as Joshua Weiss, the defendant MEIR KAHANE, the defendant RUSSELL KELLNER, the defendant DAVID SOMER, the defendant SANDOR "ALEX" STERNBERG, the defendant MORTON WINNER, and one Gilbert Lauire, named herein as a co-conspirator, but not as a co-defendant would make firearms, as defined by Title II of the Gun Control Act of 1968, without filing written applications to make firearms with the Secretary of the Treasury and securing his approval.

It was further a part of said conspiracy that the defendant CHAIM BIEBER, the defendant STEWART COHEN, the defendant JOHN DOE, also known as "Dov", the defendant EILEEN GARFINKLE, the defendant AVRAHAM HERSHKOVITZ, the defendant NANCY HERSHKOVITZ, the defendant JOSHUA JOFFE, also known as Joshua Weiss, the defendant MEIR KAHANE, the defendant RUSSELL KELLNER, the defendant DAVID SOMER, the defendant SANDOR "ALEX" STERNBERG, the defendant MORTON WINNER, and one Gilbert Laurio, named herein as a co-conspirator, but not as a co-defendant would make firearms as defined by Title II of the Gun Control Act of 1968, without paying the required making tax.

It was also a part of said conspiracy that the defendant CHAIM BIEBER, the defendant STEWART COHEN, the defendant JOHN DOE, also known as "Dov", the defendant EILEEN GARFINKLE, the defendant AVRAHAM HERSHKOVITZ, the defendant NANCY HERSHKOVITZ the defendant JOSHUA JOFFE, also known as Joshua Weiss, the defendant MEIR KAHANE, the defendant RUSSELL KELLNER, the defendant DAVID SOMER, the defendant SANDOR "ALEX" STERNBERG, the

defendant MORTON WINNER, and one Gilbert Laurie, named herein as a co-conspirator, but not as a co-defendant would receive and possess firearms, as defined by Title II of the Gun Control Act of 1968, without filing a written application to possess and receive firearms with the Secretary of the Treasury and securing his approval.

It is also a part of said conspiracy that the defendant CHAIM BIEBER, the defendant STEWART COHEN, the defendant JOHN DOE, also known as "Dov", the defendant EILEEN GARFINKLE, the defendant AVRAHAM HERSHKOVITZ, the defendant NANCY HERSHKOVITZ, the defendant JOSHUA JOFFE, also known as Joshua Weiss, the defendant MEIR KAHANE, the defendant RUSSELL KELLNER, the defendant DAVID SOMMER, the defendant SANDOR "ALEX" STERNBERG, the defendant MORTON WINNER, and one Gilbert Laurie, named herein as a co-conspirator, but not as a co-defendant would receive and possess firearms, as defined by Title II of the Gun Control Act of 1968, without paying the required making tax.

It is additionally a part of said conspiracy that the defendant CHAIM BIEBER, the defendant STEWART COHEN, the defendant JOHN DOE, also known as "Dov", the defendant EILEEN GARFINKLE, the defendant AVRAHAM HERSHKOVITZ, the defendant NANCY HERSHKOVITZ, the defendant JOSHUA JOFFE, also known as Joshua Weiss, the defendant MEIR KAHANE, the defendant RUSSELL KELLNER, the defendant DAVID SOMMER, the defendant SANDOR "ALEX" STERNBERG, the defendant MORTON WINNER, and one Gilbert Laurie, named herein as a co-conspirator, but not as a co-defendant would receive and possess firearms not registered to them in the National Firearms Registration and Transfer Record. (Title 18 United States Code, Section 371.)

In furtherance of said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendant CHAIM BIEBER, (hereinafter referred to as BIEBER), the defendant

STEWART COHEN, (hereinafter referred to as COHEN), the defendant JOHN DOE, also known as "Dov", (hereinafter referred to as DOV), the defendant EILEEN GARFINKLE, (hereinafter referred to as GARFINKLE), the defendant AVRAHAM HERSHKOVITZ, the defendant NANCY HERSHKOVITZ, the defendant JOSHUA JOFFE, also known as Joshua Weiss, (hereinafter referred to as JOFFE), the defendant MEIR KAHANE, (hereinafter referred to as KAHANE), the defendant RUSSELL KELLNER, (Hereinafter referred to as KELLNER), the defendant DAVID SOMMER, (hereinafter referred to as SOMMER), the defendant SANDOR "ALEX" STERNBERG, (hereinafter referred to as STERNBERG), the defendant MORTON WINNER, (hereinafter referred to as WINNER), and one Gilbert Laurie, herein named as a co-conspirator, but not as a co-defendant committed the following:

OVERT ACTS

1. On or about the 2nd day of July 1970, at New York, New York JOFFE, BIEBER, AVRAHAM HERSHKOVITZ and COHEN had a meeting at which meeting BIEBER stated that a contact had been obtained to procure dynamite.

2. On or about the 20th day of July 1970, at Woodbourne, New York, KAHANE instructed COHEN to teach the manufacture and use of fire bombs and explosive devices.

3. On or about the 21st day of July 1970, at Woodbourne, New York, COHEN instructed and demonstrated the manufacture and use of Molotov Cocktails and incendiary devices.

4. On or about the 28th day of July 1970, at Woodbourne, New York, COHEN, KELLNER, SOMMER, STERNBERG AND DOV possessed incendiary devices, to wit: Molotov Cocktails.

5. On or about the 30th day of July 1970, at Brooklyn, New York AVRAHAM HERSHKOVITZ, NANCY HERSHKOVITZ and COHEN met at the Hershkovitz residence, where COHEN procured fifteen (15)

pounds of gun powder and then transported it to the residence of BINDER at Queens, New York.

6. On or about the 6th day of August 1970, at New York City, New York WINNER and BINDER discussed the manufacture and use of explosive devices.

7. On or about the 10th day of August 1970, at Woodbourne New York WINNER, STERNBERG and COHEN attempted to manufacture explosive devices from components brought to Woodbourne, New York that day to WINNER.

8. On or about the 24th day of August 1970, at Woodbourne, New York COHEN instructed CAMPBELL in the making of incendiary to wit, Molotov Cocktails.

9. On or about the 25th day of August 1970 at Woodbourne, New York WINNER made and detonated destructive devices.

10. On or about the 31st day of August 1970, at Woodbourne, New York, KAHANE and COHEN had a conversation concerning COHEN making and detonating an explosive device.

11. On or about the 1st day of September 1970, at Woodbourne, New York, COHEN made an explosive device and detonated same in the presence of STERNBERG and KAHANE.

12. On or about the 11th day of September 1970 at Warrenton, Virginia, JOYCE and Laurie attempted to purchase dynamite.

13. On or about the 12th day of September 1970, at Brooklyn, New York AVRAHAM HERSHKOVITZ and NANCY HERSHKOVITZ possessed a hand grenade body, a fuse assembly for same and thirty (30) pounds of gun powder.

14. On or about the 27th day of September 1970, at Queens, New York NANCY HERSHKOVITZ possessed a destructive device consisting of a hand grenade body filled with black gun powder and a fuse assembly for same.

15. On or about the 29th day of September 1970, at

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New York City, New York GARFINKLE possessed a package of underwater fuse.

A TRUE BILL

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FOREMAN

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UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

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FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y
FEB 21 1975
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -vs- MEIR KAHANE	VIOLATION OF PROBATION 71 CR--479

M'FILMED

WHEREAS the defendant having pleaded guilty in the United States District Court for the Eastern District of New York, to the violation of T-18, U.S.C.Sec.371 and on July 23, 1971, the defendant was sentenced to imprisonment for 5 years. Execution of sentence was suspended and the defendant was placed on probation for 5 years and fined $5,000.00., and

The defendant having appeared in court for a hearing charging violation of probation and after hearing counsel for the defendant, Barry Ivan Slotnick and Assistant U.S. Attorney Pattison, the Court finds the defendant guilty of violation of probation and probation imposed on July 23, 1971 is hereby revoked and the defendant is resentenced as follows:

Defendant is sentenced to imprisonment for a period of one (1) year. Stay of execution of sentence granted to February 26, 1975 at 9:30 A.M. Bail limits New York City and Nassau County, and

IT IS ORDERED that the Clerk deliver certified copies to the U.S. Marshal and the Probation Dept. for the Eastern District of New York.

Dated: Brooklyn, New York
Feb. 21, 1975

U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNTIED STATES OF AMERICA, :

-against- : 71-Cr-479

MEIR KAHANE, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

March 17, 1975

B e f o r e :

HONORABLE JACK WEINSTEIN, U.S.D.J.

MICHAEL J. MIELE
OFFICIAL COURT REPORTER

APPEARANCES:

DAVID G. TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York

BY: THOMAS PATTISON, ESQ.

BARRY SLOTNICK, ESQ.,
Attorney for the Defendant

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an order in which it would be directed that he be maintained at the West Street facility which I understand will be moved within one month to its new facilities across the way from the Southern District courthouse.

I ask that for the reason that my prior experience with Mr. Hershkowitz was that when he was ordered to have kosher food as close as Danbury, for four months he ate apples and oranges. Mr. Hershkowitz was born in Dachau and anything after that might not have had the effects that it might have on Rabbi Kahane, also Mr. Hershkowitz was overweight.

Rabbi Kahane can, if you so ordered, be maintained in the Manhattan facility and can, if your Honor again so ordered it, receive appropriate kosher food, not the apples and oranges which past history is, that a past defendnant of this ilk had received.

One of the advantages we have with regard to the Manhattan is he has a lawyer within walking distance and a courthouse within walking distance. He asked to have the right to keep and maintain, phylacteries known as tfilim in Hebrew. He's asked to have an electric shaver for the simple reason that Mr. Hershkowitz was forced to shave, being of orthodox persuasion.

MR. SLOTNICK: As your Honor well knows, my client has the obligation of surrendering tomorrow approximately at 9:30 to the United States Marshal to commence service of his sentence of one year. A notice of appeal was filed due to administerial error in my office. I have withdrawn that notice of appeal pursuant to stipulation.

It will be filed in this court and so ordered by the United State Court of Appeals Second Circuit Which is the procedure which must be followed. The notice of appeal was withdrawn based upon what I believe some sound legal reasoning, not at the insistence of the defendant, to be clear for the record, but with his consent.

He is going to jail tomorrow and the basic problem we have is that Rabbi Kahane is a man of orthodox persuasion and will find great difficulty with regard to the service of his sentence.

He is going in knowing that within a week or 10 days, I am not sure when, there will be the holiday of Passover and he has instructed me not to ask your Honor to allow him to be out for that period of time because he has a wife and four children in Israel and he wants to get it over with and join them.

I would ask your Honor for the right to submit

He's also asked in discussing this that he have the right to receive certain literature that he uses with regard to his writings and with regard to that he as asked your Honor to have the right to have a typewriter and he be able to have his books with him when he is incarcerated.

The request that I make at this time is that we be able to submit to your Honor an order encompassing all of these requests. I don't think anybody is prejudiced by it.

Rabbi Kahane is going to jail as are thousands of others during the course of the year. I would suggest to the Court that he is different than thousands of others for the simple reason that he is a man who is a known writer, he has written, he is expressive and he is involved in his area and situation of circumstances and desires to continue to pursue his -- not only -- perhaps we can call it First Amendment rights but to continue what he considers to be his life work and I aske your Honor not to interrupt that in view of the judgment of the Court a few weeks ago.

THE COURT: When is the new House of Detention going to actually open?

MR. SLOTNICK: I believe one month. It's

scheduled to open one month.

MR. PATTISON: As of now, my information is that Allenwood, Pennsylvania, has be picked as the tentative site for the actual sentence. I believe, my experience the past four and a half years has been that West Street would not be the place for him to serve his year's time.

THE COURT: Well, West Street would be out. The question is whether the new House of Detention would be a better place.

MR. SLOTNICK: I have done some quick research with regard to the new House of Detention. I understand they will have single cells and appropriate facilities. It is also my understanding it is opening up next month.

I would be presumptious enough to make an application to your Honor which I hope you don't pursue in the vein of Rule 35, but so that I am not precluded from doing so at another time and against my client's wishes but it would accomplish both ends, that he be allowed to report to the opening of the new prison when it does open up and he be given credit for the time served because frankly, without his wife and family even though he has the benefit of walking throught the streets, he is restricted and

he has his own jail to contend with. I don't believe anybody would be prejudiced by that.

THE COURT: What is he going to do during this period? Is he going to create further problems for himself?

MR. SLOTNICK: I presume, you say further problems, during this period of time -- I presume we could put certain restrictions upon him to satisfy the Court and give him credit for that period of time served. I am not suggesting he serve that period of time in anyone's home but perhaps that might be best for all.

It's unfortuntate circumstance we all face with regard to this issue. I am horrified and I say this to the Court that he has chosen of his own volition to enter prison pending Passover holidays because I know he won't eat during that period of time. His concern is a genuine one. He wants to get back to his wife and family.

THE COURT: April 3rd is the last day, my secretary tells me.

MR. PATTISON: The last time we appeared, the Court order was that efforts be made to insure that he not be victimized by attack, by other methods with a view toward potential fellow inmates using him as

a target in any way, shape or form. The West Street facility and the new prison facility will be the same as West Street in as much as it will accept transient prisoners, prisoners charged with crimes of all types, and it will be broken down, I'm sure the same way as West Street now, that is into several areas: General population, the second level known as segregation and the third area being maximum.

These three areas, no one in these three areas is locked in 24 hours a day. Prisoners roam about. There is a constantly changing cast of prisoners.

THE COURT: Well --

MR. PATTISON: I feel Allenwood represents a minimum type institution. Prisoners get to go there only when they have demonstrated they can cope with prison life.

THE COURT: What can they do about his diet in Allenwood?

MR. PATTISON: I believe steps can be taken at Allenwood, which is a farm. I know prisoners are allowed to leave the camp and go into the town. I assume shopping can be done there. I would think that the dietary problem could be possibly taken care of there. I know with regard to the person mentioned earlier, Hershkowitz, I remember when he was in

West Street, every week there was another problem.

THE COURT: Yes, I remember.

MR. SLOTNICK: Unless you send an order.

MR. PATTISON: Even after the order. I believe the order had to be reenforced on at least one occasion with regard to another problem. I feel if the dietary problems can be worked out, I believe that the second area which the Court mentioned concerning possible harm from other inmates, I believe West Street represents, and or the new prison facility which will serve the same function, temporary detention.

THE COURT: I think you are probably right, West Stree or new detention furnishes more physical dangers. Supposing we do it this way: We will require him to surrender tomorrow and the period unti April 4th will be served at the Community Treatment Center in New York with the right of the defendant to leave for religious services and all meals and with the right of, with his right to have his books and typewriter with him in his room. On April 4th, sentence will be served at a minimum security institution such as Allenwood where again he will have the right to his typewriter and a reasonable number of books. He can't bring in his whole library.

MR. SLOTNICK: He has one large scroll --

THE COURT: He can take his scroll.

MR. PATTISON: Recent months have shown that Allenwood has borne very good writers. If there are any problems with respect to his dietary requirements, you will get in touch with the Court at once and we will make arrangements but the warden is to be kept informed that he does have these dietary requirements and that as a practicing rabbi, if there is not a minyon available in the institution and if there is a reasonably close synagogue, he will be allowed to go to town services there. He can have an electric shaver and phylacteries with him. The right to receive literature he can receive anywhere. I don't think there is any limitation.

MR. SLOTNICK: As part of his studies he does receive what is know as hate-literature. There are First Amendment cases -- he receives literature from all segments of society, part are anti-semitic literature.

THE COURT: He is entitled to get it under the cases?

MR. PATTISON: As far as I know, yes.

THE COURT: I don't think we need an order on that.

MR. SLOTNICK: As a First Amendment proposition the cases have indicated he is entitled to receive this type of literature. Does that solve your difficulties?

MR. SLOTNICK: Almost, your Honor. For the moment I suggest they solve a great deal of difficulties. I would indicate to the Court all of the propositions laid out at this point apparently appear to be reasonable, I hope they are workable.

THE COURT: We will have to see, if not we will have to make other arrangements.

MR. SLOTNICK: Will he be allowed to maintain a tape recorder with him or is -- that might be --

THE COURT: He can certainly do it while he is in Community Treatment Center, there is nothing to prevent that. What happens in Allenwood, I don't know.

MR. SLOTNICK: Thank you. He will surrender tomorrow morning to the marshals in this building who will be instructed where to take him.

THE COURT: You will take him up to the Community Treatment Center. If they don't have a room for him, he will have to come back when he has a room. Just instruct him to come back each morning until they have a room for him. We have plenty of

hotel rooms but not enough in our Community Treatment Centers.

Thank you.

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U.S. DIST... E.D. N.Y.

MAR 17 1975 71 A 33

TIME A.M.....
P.M.....

CERTIFIED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

MEIR KAHANE

AMENDED COMMITMENT
VIOLATION OF PROBATION

71 CR 479

WHEREAS, the defendant, having pleaded guilty in the United States District Court for the Eastern District of New York, to the violation of T-18, U.S.C. Sec. 371 and on July 23, 1971, the defendant was sentenced to imprisonment for 5 years. Execution of sentence was suspended and the defendant was placed on probation for 5 years and fined $5,000.00 and

The defendant having appeared in court for a hearing charging violation of probation and after hearing counsel for the defendant, Barry Ivan Slotnick, and Asst. U.S. Attorney Pattison, the Court finds the defendant guilty of violation of probation and probation imposed on July 23, 1971, is hereby revoked and the defendant is resentenced as follows:

Defendant is sentenced to imprisonment for a period of one (1) years. Stay of execution of sentence granted to Feb. 26, 1975 at 9:30 A.M. Bail limits New York City, Nassau and Suffolk County.

Thedefendant will report for commitment on March 18, 1975 and be taken by the U.S.Marshal to the Community Treatment Center in which he is to stay until April 4, 1975. He is to have a room from which he will be allowed to leave for all meals and for religious services. He may bring his books and typewriter with him. On April 4, 1975 he is to be transferred to a minimum security institution with the right to have his typewriter and books with him. Court recommends Allenwood, Pennsylvania. He is to have an electric shaver and phylacteries. The Warden is to be informed of the Court's orders. Rabbi Kahane is a practicing Rabbi, if there is no minion (quorum of 10 men) he is to be reasonably allowed to attend services, and

IT IS ORDERED that the Clerk deliver certified copies of this Order to the U.S.Marshal and the Probation Dept. for the Eastern District of New York.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. NY
APR 4 1975
TIME A.M.....
P.M.....

Dated: March 17, 1975
Brooklyn, New York

U.S. DISTRICT JUDGE

Vested further order of the court the defendant will be kept at a community treatment center in New York City, being allowed out to eat meals and attend religious servic

April 4, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

MEIR KAHANE,

Defendant.

Indictment No. 71Cr. 479

ORDER GRANTING LEAVE TO DEPART JURISDICTION

The defendant, MEIR KAHANE, having made application by his attorney for an order granting him leave to depart the jurisdiction of this court for religious reasons, and the U.S. Attorney for the Eastern District of New York not opposing said relief, it is hereby

ORDERED that the defendant, MEIR KAHANE, be, and he hereby is, granted leave to depart the jurisdiction of this court to commence a furlough from his present place of incarceration, for religious reasons, commencing with the 26th day of March, 1975 - on or before 10:00 A.M. - and continuing until the 29th day of March, 1975 - on or before 10:00 P.M. - at which time he shall be returned to custody; and the defendant, MEIR KAHANE is to be furloughed to the addresses contained in the annexed affirmation of Barry Ivan Slotnick, Esq., which is incorporated by reference into this order.

It is further

ORDERED that the defendant, MEIR KAHANE, be, and he hereby is, granted a second furlough for religious purposes, which furlough shall commence on or before noon on the 1st day of April, 1975, and terminate on or before 10:00 P.M. on the 3rd day of April, 1975, at which time he shall be returned back to his place of confinement; and

It is further

ORDERED that the above-named defendant, MEIR KAHANE, shall not be transported to his designated place of incarceration on any Friday, due to religious reasons; and surrender him self at Allenwood, Penn. (Fed Corr Inst) on Monday April 7 1975

It is further

ORDERED that the defendant, MEIR KAHANE, shall render himself amenable to the further orders and process of this court, during the said periods of furlough.

Dated: New York, New York
March 25, 1975

U.S.D.J.

Consented to: DAVID G. TRAGER

By: THOMAS PATTISON
Asst. U.S. Attorney

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FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★
APR 16 1975
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA :

-against- :

MEIR KAHANE, : 71 Cr 479

Defendant. :

- -x

United States Court House
Brooklyn, New York

April 4, 1975
3:15 o'clock p.m.

Before:

HONORABLE JACK B. WEINSTEIN, U. S. D. J.

ILENE GINSBERG
OFFICIAL COURT REPORTER

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

Official Court Reporter
U. S. District Court

Appearances:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

BY: THOMAS PATTISON, ESQ.,
Assistant United States Attorney.

BARRY IVAN SLOTNICK, ESQ.,
Attlrney for Defendant.

* * * *

THE CLERK: U. S. A. v. Meir Kahane.

MR. SLOTNICK: With regard to the matter before the Court, I have an application.

I might as well give your Honor the final facts. I have been told by the Bureau of Prisons they will not obey your Honor's order and provide Rabbi Kahane with kosher food and will not respect your Honor's order with respect to religious belief concerning kosher food and concerning the possibility of going to synagogue.

THE COURT: Well, aren't there enough Jewish people in Allenwood to form a minion?

MR. SLOTNICK: There may or may not be.

THE COURT: If there are, they can hold services within the prison walls. If not, he must be permitted to go out into the community.

MR. SLOTNICK: The Bureau of Prisons have told me point-blank they will not obey your Honor's order.

THE COURT: Would you like to respond, Mr. Pattison?

MR. PATTISON: First of all, may I say, the order can be -- although there is a serious doubt as to the actual evidence of the court order concerning the Bureau of Prisons rules and regulations, et cetera -- the Bureau of Prisons can and will treat

him as they do every other Jewish prisoner concerning food, kosher food, on certain days, Passover, holidays, et cetera.

THE COURT: They have to give him kosher food every day. It is not a thing he can have one day a year or a few days a year.

MR. PATTISON: That is where the problem comes up. There have been, and apparently - and there is presently - a case in the Southern District now involving two others - Smilow and Huss - two other Defense League members, and this is set for a hearing later this month -- I believe the 16th day of the month, concerning the food issue.

The prison points out that preferential treatment for any one person would be detrimental to the the policy concerning other groups.

THE COURT: It is not a question of preferential treatment but what is required under First Amendment rights.

If the Government wants to take custody of somebody, they have to do it without violating his constitutional rights. I don't know what the answer to this is. It has not been briefed.

The defendant has not submitted to me any religious experts who will tell me whether the laws

must be obeyed under the circumstances. There are situations where kosher food need not be provided in emergency situations. All dietary regulations are subject to emergencies of one type or the other.

Now, I don't know what the law is. I am not a rabbinical scholar and I don't even know enough about American law to know what the answer is. It is a difficult problem, but assuming that he has a right to kosher food and it is in violation of his constitutional rights to deny it and assuming, too, that it is a serious religious lapse for him not to have kosher food, I think we have to wait until we see what you come up with.

I am just not satisfied that counsel has done anything to make it possible for me to decide this in a sensible way.

MR. SLOTNICK: Your Honor, I am prepared to submit a memorandum of law to your Honor this coming week. There is a depth of cases surrounding the issue.

THE COURT: You had better also submit, and the Government will probably have to consult some rabbinical experts and submit either through testimony or or through affidavits information with respect to what the religious law is here.

What is the situation?

MR. PATTISON: Mr. Trager may help in that area.

THE COURT: Are you aware of the law?

MR. PATTISON: Mr. Trager, as I say, may help in this instance. But may I cite one instance, quoting Rabbi Kahane complaining about Mr. Morse's bail application; a Jewish scholar, Rabbi Davis's advice to a young Army officer, who asked him if while in the Army he had to eat port, could he eat pork, and the rabbi said - quoting Rabbi Kahane - "Yes, you may, but you may not suck the bones."

That is Rabbi Kahane.

Now, that leads me to believe that there are emergency situations wherein a person may eat other foods --

THE COURT: Yes, but I don't hold myself out as an expert on either American constitutional law or rabbinical law.

When is he supposed to surrender?

MR. SLOTNICK: Monday.

THE COURT: That will have to be stayed until this is straightened out. When can you get briefs and expert testimony to me?

MR. SLOTNICK: We would be ready for a

hearing next Friday.

MR. PATTISON: I don't know about a hearing.

THE COURT: Well, the Government may need more time. How much time do you want?

MR. PATTISON: I would say it would take me a lifetime to learn about this but I think if we have a week after receiving the papers, I think we can answer them then.

THE COURT: Defendant Kahane's brief will be in next Friday. The Government's papers will be in the Friday thereafter and then we will set a date for a hearing.

MR. PATTISON: Just for the record, we are ready, willing and able to abide by every term of the current order as it exists now, which was signed by the Court which does not specify kosher food.

THE COURT: He will have to stay in the community treatment center until further order.

MR. PATTISON: May I correct what I said last? I assume the application before the Court today will amend the order as it is presently written to include the requirement of kosher food at Allenwood, which is not in the order?

THE COURT: He will remain at the community treatment center and supply his own food.

MR. SLOTNICK: That's what he does now.

MR. PATTISON: Well, the present order does not precisely require kosher food at Allenwood.

THE COURT: That is what I have to decide.

MR. SLOTNICK: That is the issue.

THE COURT: What is the status of the Southern District case?

MR. PATTISON: It is on for the 16th of April.

THE COURT: Before whom?

MR. SLOTNICK: Judge Krushane.

Your Honor, I have had Rabbi Kahane in my home for the last few days and I have become somewhat of a rabbinical scholar. It is amazing how much I don't know. I am convinced he is an extremely religious, practicing Orthodox rabbi.

THE COURT: Well, there are plenty of Talmudic scholars in the City of New York.

MR. PATTISON: Just go through the witness list of the last hearing.

THE COURT: If you want to agree on a court-appointed expert, we can do that, too.

MR. SLOTNICK: May we have a stay directed by the Court because the Marshal's office, although I am an officer of the court, may not agree?

THE COURT: Well, you had better get up an

order quickly. Thank you.

MR. PATTISON: This is the order as it exists now (indicating).

MR. SLOTNICK: Could you put a stay on that order?

MR. PATTISON: This is a copy which your Clerk was kind enough to make for me.

THE COURT: Let me have it (document handed to Court).

Until a further order of the Court, the defendant will be kept at a community treatment center in New York City, being allowed out to eat meals and attend religious services.

Thank you, gentlemen.

MR. SLOTNICK: Again, I would indicate for the record that I would have supplied a memorandum today but I have spent the last two and a half days at synagogue as a result of Rabbi Kahane's visit and perhaps that will help in the writing of my brief.

* * * *

A 45

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

MEIR KAHANE,

Defendant.

71-Cr-479

NOTICE OF MOTION FOR ORDER PROVIDING KOSHER FOOD FOR DEFENDANT

S I R S :

PLEASE TAKE NOTICE that upon the annexed motion and exhibits, the undersigned will move this Court before the Honorable Jack B. Weinstein for an Order directing the United States to make available to the defendant, during his incarceration, kosher food on a regular daily basis and the availability of a duly constituted minyan, all for reasons more fully set forth in the annexed motion and in the memorandum in support of said motion.

Dated: New York, New York
April 11, 1975

Yours, etc.

BARRY IVAN SLOTNICK
Attorney for Defendant
233 Broadway
New York, New York
(212) 233-5390

TO: DAVID TRAGER, ESQ.
United States Attorney
Eastern District of New York
United States Courthouse
Brooklyn, New York

(7)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

MEIR KAHANE,

Defendant.

71-Cr-479

MOTION FOR ORDER PROVIDING KOSHER FOOD FOR THE DEFENDANT

Defendant, Rabbi Meir Kahane, respectfully moves this Court for an Order directing the United States and its officers to make available to him, on a regular daily basis, kosher food that meets Orthodox Jewish requirements comparable in nutritious content to the regular menu served to all other inmates in federal institutions.

Furthermore, the defendant moves for an Order directing that during the period of his incarceration, should at any time a "minyan", as defined by Orthodox Jewish law, not be available, that defendant be permitted to go to religious services in a nearby town where such a "minyan" be available.

The grounds for this motion, more fully set out in the attached Memorandum of Law, are that the defendant is entitled, by reason of the First and Eighth Amendments to the United States Constitution, to serve his prison sentence in a manner that is not cruel and unusual and that accords with the dictates of his conscience and his religion. Since there are available means by

which the defendant may be lawfully kept in federal custody and still have adequate and nutritious kosher food available to him and the additional requirement of a duly constituted "minyan" available to him, this Court should direct that means to those ends be employed.

Dated: New York, New York
April 11, 1975

Yours, etc.

BARRY IVAN SLOTNICK
Attorney for Defendant
233 Broadway
44th Floor
New York, New York 10007
(212) 233-5390

Ct. Ex. #2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK 11201

CHAMBERS OF
JACK B. WEINSTEIN
DISTRICT JUDGE

A 48

April 17, 1975

Mr. Matthew Walsh
Center Complex Director
Community Treatment Center
Department of Justice
Federal Bureau of Prisons
210 East 55th Street
New York, New York 10019

Dear Mr. Walsh:

Thank you for your letter of April 16, 1975. A copy of it, together with my response, is being sent to the attorney for Rabbi Meir Kahane and to the United States Attorney.

The papers from the United States Attorney in this case should be received by this office on Friday, April 18th, and a hearing is scheduled for Monday, April 21st, at 10:00 A.M. At that time the United States Attorney may wish to present information available to you through witnesses or otherwise.

The court appreciates your cooperation in this, and other, matters. It recognizes that while the Community Treatment Center provides great actual and potential advantages for society, the courts, and prisoners, it does present to those in charge of the facility difficult administrative problems.

With all best wishes,

Sincerely yours,

Jack B. Weinstein
U.S.D.J.

cc: Thomas R. Pattison, Esq.,
Assistant United States Attorney
Barry I. Slotnick, Esq.

COMMUNITY TREATMENT CENTER
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
210 WEST 55th STREET
NEW YORK, NEW YORK 10019

Tele : (212) 573-6391

(6)

A 49

April 16, 1975

Hon. Jack B. Weinstein
U.S. District Court
U.S. Courthouse
Brooklyn, N.Y. 11201

Dear Judge Weinstein:

I know that you are aware of the activities and statements made by or attributed to Rabbi Meir Kahane as reported in the news media. An example of his reporting is found on page 3 of today's issue New York Daily News, copy enclosed.

Rabbi Kahane's quoted statement to the effect that while at our facility he can continue to direct the Jewish Defense League activities is one that causes me some distress. Monday's press reported that over a hundred members of the JDL were arrested by the police last Sunday for staging a sitdown in the March for Soviet Jewery and Rabbi Kahane credits himself with planning that sitdown. What concerns me deeply is the public impression, to be drawn from Rabbi Kahane's statements that he has the ability to direct illegal activity while in custody of the Federal Prison System. Under his present circumstances he does have that capability but this agency does not condone that behavior and I would appreciate your consideration in amending the Court order to clearly proscribe such behavior while in our custody.

By order of the Court, Rabbi Kahane is permitted to leave our facility each day for periods of time to allow specifically for meals and religious services. We do not have the capacity to control or supervise his activities during those periods.

Rabbi Kahane has had several press conferences during his time at our facility. This has required more staff time and attention than we can reasonably afford and is disruptive of our normal and orderly function. As you can well appreciate this case is not one programmed for the design of a Community Treatment Center but it is one which can tax the limits of our resources.

I have these concerns and want to share them with you. I know that you understand some of our problems and limitations and we can also appreciate some of the intricacies you face in dealing with complex cases. Perhaps by expressing these concerns we can come to a better appreciation of some of the unique problems that somehow or other always crop up in New York.

Sincerely,

MATTHEW WALSH
Center Complex Director

MW:mkg

DAILY NEWS, WEDNESDAY, APRIL 16, 1975

Kahane Free And Easy at W. Side 'Jail'

By WILLIAM SHERMAN

Rabbi Meir Kahane was sentenced to spend a year in a federal penitentiary last month, but because of an unusual court order the militant rabbi is ensconced in a West Side apartment hotel and is allowed to travel around the city for seven hours a day.

The outspoken leader of the Jewish Defense League was given the jail term for violating conditions of a 1971 parole which prohibits direct or indirect contact with guns, bombs, dynamite or other weaponry.

But under special conditions granted by Brooklyn Federal Judge Jack Weinstein, Kahane is allowed out of the apartment, a halfway house for federal prisoners, from 6 until 9 in the morning, noon until 1 p.m., and 6:30 to 9:30 p.m.

Weinstein said yesterday that he granted the order, termed "highly unusual" by federal probation authorities, because of Kahane's protest that the U.S. Bureau of Prisons has refused to provide him with kosher food at the Allenwood, Pa. penitentiary.

The judge said he would rule next week on Kahane's motion that all Jewish prisoners be provided with a special diet upon request. Weinstein pointed out that city jails provide kosher food.

Meanwhile, Kahane is at 38 W. 31st St., where he was interviewed yesterday after his noon meal in a lounge on the seventh floor.

"Let's face it," he said, "Weinstein gave me a break. He could have sent me direct to Allenwood. But here I can direct the JDL activities. I planned the sitdown at the March for Soviet Jewry on Sunday. I can communicate with my group and make plans."

It was that kind of planning that got Kahane, who is married and has four children, into trouble in the first place. In addition to his American legal trouble, it is charged that, while visiting Israel, he plotted to smuggle arms to Europe to avenge the Arab terrorist killings at the Munich Olympics. He also directed his JDL colleagues here to firebomb the Soviet Mission as a protest against Soviet treatment of Jews.

"Look, I admit I did it, I make no bones about it, and I'd do it all again," said the bearded rabbi, who said he spent most of his time at the hotel "studying and typing while not receiving visitors."



Meir Kahane at a news conference last week.

Asked if his notion about kosher food was not a stratagem to keep him in Manhattan and in direct control of the JDL, Kahane replied: "I'm kosher, and I believe that all Jewish prisoners should have the right to that diet. But let's face it, if I was in Allenwood I could live on vegetables."

Commenting on his quarters on 31st St., Kahane said, "This place is easy compared to prison in Israel. That was a real prison. I was in solitary for 30 days on a stark diet. Here I can go out, eat my food, pray and see my friends."

On 31st St., Kahane shares a room with a man who his lawyer, Barry Slotnik, says "is a bank robber." During the interview Kahane said, "I'm comfortable here, I'm comfortable anywhere. Prison is easy so long as you have something to read."

Asked about the court order, Weinstein said: "I use the halfway house usually for a man who is working and has a family to support, so the family won't break up."

"Kahane's case is special," said Weinstein. James F. Barron, chief U.S. probation officer for the Eastern New York District, said of the judge's order: "It's highly unusual. He is serving out his sentence at the halfway house until further orders from Judge Weinstein."

But even if he eventually has to go to Allenwood, Kahane will probably have a soft time of it. It is a minimum-security, lenient institution.

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

DGT:om

United States Department of Justice

A 52

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

April 18, 1975

Honorable Jack B. Weinstein
United States District Judge
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Meir Kahane
Docket No. 71 CR 479

Dear Judge Weinstein:

This letter is submitted for the purpose of summarizing the position of the United States regarding (1) the motion of the defendant, Meir Kahane, filed on April 11, 1975, for an order compelling prison authorities "to make available to the defendant during his incarceration, kosher food on a regular daily basis and the availability of a duly constituted minyan", (defs. Notice of Motion, filed April 11, 1975), and (2) the validity of the judgments and orders entered subsequent to the entry of the initial judgment on February 21, 1975.

We submit that the motion of the defendant, Meir Kahane, is little more than a transparent effort to prolong his continued "presence" in the Community Treatment Center in New York City. Indeed, the defendant has apparently had little reluctance in publicly stating the purpose of raising the "kosher food" issue. Thus, on April 15th he told a New York Daily News reporter that "[T]he Court could have sent me direct to Allenwood. But here I can direct the JDL activities. I planned the sitdown at the March for Soviet Jewry on Sunday. I can communicate with my group and make plans". (New York Daily News article attached.) After being asked "if his motion about kosher food was not a stratagem to keep him in Manhattan and in direct control of the JDL," Mr. Kahane replied "I'm kosher,and I believe that all Jewish prisoners should have the right to that diet. But let's face it, if I was in Allenwood I could live on vegetables." (New York Daily News article attached.)

(10)

Similar evidence of the disingenuous nature of the defendant's position is evidenced by his sudden change of heart regarding his place of incarceration. While the defendant initially requested that he be allowed to serve his sentence in West Street, citing the alleged availability of kosher food in that institution (Min. of March 17, 1975, p. 2(a)), he has apparently now abandoned that application. Indeed, defendant's moving papers are taken almost verbatim from those recently filed in a proceeding by other defendants in the Southern District of New York, (United States v. Smilow. 73 CR 24) who sought to have their place of confinement changed to West Street. However, there is one significant difference between the two sets of papers. Included in the papers filed in the Southern District proceeding is an affidavit by one Ben B. Weintraub of an organization called "The National Association for Justice", which alleges that kosher food is available at the West Street facility. That specific allegation is omitted in the otherwise identical affidavit of Mr. Weintraub filed in the instant proceeding. Thus, it is apparent that what Rabbi Kahane desires is not a prison facility where he can have kosher food, but, instead a half-way house where he will be under little more restraint than an ordinary citizen staying at a hotel. Although, initially, in a desire to accomodate what we thought were sincerely motivated religious beliefs we did not do so, we are now compelled to voice an objection to the propriety and validity of the Amended Commitment filed on March 17, 1975, and the order entered on April 4, 1975, staying the transfer to Allenwood.

I

We submit, first that having entered a judgment convicting the defendant of violating his probation, the district court was without power to amend that judgment other than for the purpose of correcting any "illegality" or any "clerical error". F.R. Crim. P. Rules 35 & 36. Moreover, even assuming the district court does possess the power to amend the judgment of conviction, it is without power to direct the Attorney General to place the defendant in any particular institution or to order him to provide the defendant with any particular diet. Section 4082 of Title 18 of the United States Code provides in pertinent part:

> (a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.
>
> (b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another.

It is thus settled that a district court may not designate a place of confinement in its sentence since this is "a matter confided by the statute exclusively to the discretion of the Attorney General". Hamilton v. Salter, 361 F.2d. 579,581 (C.A. 4th Cir. 1966) (sentence providing for concurrent service with State sentence held impermissible designation of place of confinement). As the Court of Appeals for the Fourth Circuit observed in the Hamilton case, supra, 361 F.2d at 581:

> "In practice the sentencing court in the order of commitment frequently recommends a place for the convict's detention. However, while it is generally followed by the Attorney General, it is only a recommendation and not an order of the court."

Accord, Floyd v. Henderson, 456 F.2d. 1117, 1119 (5th Cir. 1972); United States v. Farmer, 343 F. Supp. 955, 956 (E.D. Tenn. 1972); United States v. Tomaiolo, 294 F. Supp. 1296, 1299 (E.D.N.Y. 1969) ("The designation of a place of confinement is no part of a judicial sentence and is nothing more than surplusage"); United States v. McIntyre, 271 F. Supp. 991, 999-1000 (S.D.N.Y. 1967). See also, Lawrence v. Willingham, 373 F.2d. 731 (10th Cir. 1967) (Attorney General has exclusive authority to transfer prisoners

pursuant to 18 U.S.C. 4082). Moreover, it has been specifically held that the discretion to assign a committed prisoner to a community treatment center is vested exclusively in the Attorney General pursuant to 18 U.S.C. 4082(c) and (f). Mercer v. U.S. Medical Center for Federal Prisoners, 312 F.Supp. 1077 (D.C. Mo. 1970) (denied habeas corpus petition; prisoner had alleged that he had been wrongfully denied assignment to a community treatment center).

Accordingly, we respectfully submit that, to the extent that the Amended Commitment, dated March 17, 1975, directs that the defendant is "to stay" at the Community Treatment Center until April 4, 1975, it is invalid. Similarly, the direction contained in the order entered on April 4, 1975, extending the period during which the defendant would "be kept" at the Community Treatment Center is likewise invalid. We, therefore, ask that both these directives be vacated forthwith.

II

We need not burden this letter with any lengthy response to the merits of the application of the defendant because, among other reasons, the application is premature. The key requirement of any claim that the internal administration of a prison denies the prisoner fundamental rights is that the prisoner has first exhausted his administrative remedies. Kochie v. Norton, 343 F. Supp. 956, 956 (D. Conn. 1972) (dismissed petition alleging prisoner was prevented from wearing medically prescribed shoes).

In Waddell v. Alldredge, 480 F.2d. 1078 (3rd Cir. 1973) the Court of Appeals held that an action brought to compel officials of the United States Penitentiary to allow Black Muslims to establish worship services and to prepare at least one pork-free meal per day could not be maintained because the inmates had failed to exhaust administrative remedies through application to the U.S. Bureau of Prisons. Accord, Paden v. United States, 430 F.2d 882 (5th Cir. 1970). The Court of Appeals in Waddell v. Alldredge, supra, specifically referred to Section F(1) of the Bureau of Prisons Policy Statement 7300. 43A, dated 7/7/70, which provides in pertinent part:

Honorable Jack B. Weinstein April 18, 1975

> "A committed offender may abstain from eating those food items, served to the general population, which are prohibited by the religion of the resident. The committed offender may receive added portions of non-rationed food items, from the main serving line, which in no way cause a violation of the restrictions of the faith professed by the committed offender." (Id. at 1080 n.3.)

Moreover, Section 7300.43A, was also construed in Theriault v. Carlson, 339 F. Supp. 375 (N.D. Georgia 1972), to commit the Bureau of Prisons to "extending the greatest amount of religious freedom possible within a prison context to committed offenders, and assisting them in the practice of the 'religion of their choice'."

We, therefore, submit that when and if the defendant is transferred to Allenwood and has exhausted his administrative remedies, and claims that prison authorities are violating his First Amendment rights, there will be sufficient opportunity to petition for judicial relief in an appropriate procedural setting. Indeed, we note that every case cited by the defendant demonstrates the present criminal proceeding is not the vehicle by which the relief sought may be judicially obtained.

Respectfully submitted,

David G. Trager

DAVID G. TRAGER
United States Attorney

cc: Barry Ivan Slotnick, Esq.
233 Broadway
New York, New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

71-CR-479

-against- :

MEIR KAHANE, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

April 24, 1975

B e f o r e :

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

BURTON SULZER
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: THOMAS PATTISON, ESQ
-and-
EDWARD R. KORMAN, ESQ.
Assistant U.S. Attorneys

BARRY SLOTNICK, ESQ.
MARTIN ELEFANT, ESQ.
Attorneys for Defendant

DENNIS RAPPS, ESQ.
AMICUS CURIAE
(For COLPA)

.GA
IRIAM

THE CLERK: United States against Meir Kahane.

THE COURT: Just to refresh your recollection, following the hearing on February 21, Meir Kahane was found guilty of violating the specific terms of his probation in that he dealt with firearms and other urged the use of explosives and guns. Accordingly, the Court sentenced him to one year, to be served in a correctional institution of the United States.

There was a further hearing on February 26, 1975, because the Court had, on the request of the defendant, granted a stay in accordance with the normal practice of this Court to permit him to settle his affairs.

On the request of the defendant, the stay was continued until March 18. The Court instructed the United States Attorney as follows:

"The United States Attorney is directed to communicate with the Attorney General of the United States, through the appropriate authorities, to indicate that precautions should be taken to insure that the defendant is not harmed while he is incarcerated.

"He is to be placed in an institution, and in a setting so that he can obtain the benefits of kosher foods and other religious requirements that he may reasonably have.

"He is not to be placed in a general high security

institution where he may be harmed by the inmates."

There was no objection made by the Government at that time to the Court's Order.

At a hearing in this Court on March 17, 1975, the matter of his religious requirements was further discussed. On page 7 of the record, Mr. Pattison says, "I believe steps can be taken at Allenwood, which is a farm." That is in response to the Court's inquiry, "What can they do about his diet in Allenwood?"

Mr. Pattison went on to say, "I know prisoners are allowed to leave the camp and go into the town. I assume shopping can be done there. I would think that the dietary problem could possibly be taken care of there.'

There then arose a problem of the Passover season. The normal practice of this Court is to allow defendants a stay so that they can celebrate religious holy days with their families. This is traditional at Christmas nd other holidays of all major religions.

But in the case of this defendant, because his family was in Israel and he could not leave the country, he preferred to begin his sentence at once. Accordingly, the Court directed at page 8 of the minutes of March 17th as follows:

"We will require him to surrender tomorrow, and the period until April 4th will be served at the Commun-

ity Treatment Center in New York, with the right of the defendant to leave for religious services and all meals.

"On April 4th, sentence will be served at a minimum security institution, such as Allenwood."

No objection was made.

At page 9, the Court noted, and there is an inaccuracy in the record which the Reporter will correct, "If there are any problems with respect to his dietary requirements, you will get in touch with the Court at once, and we will make arrangements, but the Warden is to be kept informed that he does have these dietary requirements, and that as a practicing rabbi, if there is not a minion available in the institution, and if there is a reasonably close synagogue, he will be allowed to go to attend services there. He can have an electric shaver and phylacteries with him."

Then the Court went on with respect to his right to receive various kind of literature.

The Court was then informed that on investigation of the attorneys for the defendant, Allenwood would not be able to supply kosher food, so that on April 4, 1975, this Court amended its Order of March 17, 1975 to provide, "until further Order of the Court, the defendant will be kept at a Community Treatment Center in New York City, being allowed out to eat meals and attend

religious services."

That hearing was commenced on April 18 of this year, at which time the Government took the position that this Court lacks authority to even hold a hearing on this issue, despite the fact there is presently pending in the Southern District of New York, in the case of United States versus Smilow, 73-CR-24 and 25, an extensive series of hearings on this issue. I have been favored by Judge Griesa with a copy of the transcript, and Exhibits 3 and 4 at that hearing. Some of that material does seem to me to be useful. I believe I can judicially notice it, and it will save a great deal of time if it is judicially noticed.

Is there any objection to my judicially noting it and having the Clerk mark it?

MR. SLOTNICK: The defendant has no objection.

MR. PATTISON: None, your Honor.

THE COURT: The Clerk will mark as a single Exhibit, and place in an envelope the papers I have just referred to.

THE CLERK: Marked as Court Exhibit 1.

*** (So marked.)

THE COURT: On April 16, 1975, the Court was favored by communication from Mathew Walsh, the Center Complex Director of the Community Treatment Center,

referring to certain problems that Mr. Walsh had in supervising the defendant.

The Court responded, and ordered the letter filed, and this should also be made a part of the Court record. Any objection?

MR. SLOTNICK: No objection.

THE COURT: Make it a Court Exhibit.

MR. SLOTNICH: For the record, your Honor, we have received a copy of that letter, together with your Honor's response.

THE CLERK: Court Exhibit 2.

(So marked.)

THE COURT: The Court has received a great many communications from members of the public on this matter, all of which have been filed, and are available to counsel. I have not responded to these letters, as is my normal practice to respond to every communication the Court receives, in view of the large number of them. But there is one letter which has a semi-authoritative basis, and therefore, special note should be made thereof. It is from the New York Board of Rabbis, dated April 23, 1975, which is the major organization in this area of rabbis, and if there is no objection, we will mark it as a Court Exhibit, for counsel's use.

MR. PATTISON: We would like to see it, your

Honor. But I am sure there will be no objection.

THE COURT: You may examine that before it is marked.

MR. SLOTNICK: May I join Government counsel in reading the letter, your Honor? I am not aware of it.

THE COURT: Yes.

(Pause.)

MR. SLOTNICK: The defendant has no objection to it being made part of the record.

MR. PATTISON: No objection.

THE COURT: Mark it as a Court Exhibit.

THE CLERK: Court Exhibit 3.

*** (So marked.)

THE COURT: The first issue is whether the Court has the power to proceed with these hearings. I have had the matter briefed and argued on Friday. The Court will consider the matter further, but it's tentative conclusion is that it does have the power to conduct this hearing. It clearly has the power to make recommendations to the Correctional Authorities. The Correctional Authorities have urged the Court to make suggestions with respect to conditions of incarceration. So, even as a matter of recommendation, a fact-finding hearing would be appropriate.

The Court has not yet filled out the applicable forms to be sent to the institution. Beyond that, there may well be a basis for the Court's jurisdiction, pursuant to Rule 35, if, as Government counsel concedes, that issue is not clear.

The Government's contention, apparently, is that the Court has no power to reduce sentence at the present time. There is no clear authority on the point. There are some dicta that the Court believes suggests it does have that power, but that will have to be considered further. I reserve decision on that point.

The further question, whether this Court has the power to correct conditions of incarcerating where there is a threat that involves First Amendment rights, is also a difficult problem.

The Court clearly has the power in the protection of Constitutional rights, through its extraordinary writs of habeas corpus and mandamus, to correct conditions in an institution which interfere with Constitutional rights or constitute any form of cruel or unusual treatment in a Constitutional sense.

(continued on next page.)

THE COURT: There is, however, a serious venue problem which the Court does recognize, and that is whether the application should be made in this district or in the district to which the defendant is sent. The Court reserves decision on that matter.

Since, however, a hearing in the Court's opinion is clearly authorized at the very least for purposes of recommendation, the Court will proceed.

MR. SLOTNICK: Your Honor, we would call to the witness stand as our first witness, Rabbi Moses Tendler

MR. KORMAN: Your Honor, we are prepared to waive the administration of the oath.

THE COURT: It may well be that the Rabbi has no objection to affirming. Do you?

THE WITNESS: Not to affirming, no.

R A B B I D R . M O I S H E D . T E N D L E R ,

having been called as a witness, first duly affirming, testified as follows:

DIRECT EXAMINATION

BY MR. SLOTNICK:

Q Rabbi Tendler, would you indicate what your background with regard to the field of Kashruth?

A I am a duly ordained Orthodox Rabbi.

I have a special interest in the field of Kashruth,

being one of the senior members of the State Advisory Board on Kashruth to the Department of Agriculture and Markets.

I am a member of the Rabbinic Advisory Board of the Rabbinical Council of America on Kashruth, and that is that I passed on all Kashruth matters administered by the Orthodox Union Congregation, the largest kosher certifying organization in the world.

I am also major consultant to every organization involved in Kashruth supervision.

Q Is Kashruth a basic tenet of the Jewish religion?

A The Kosher Law, like most biblical laws, occurred in two levels of categorical imperatives -- one biblical and one rabbinic.

The biblical laws, those given to us thousands of years ago, have been modified in the course of time by authentic rabbinic tradition. The Kashruth laws are of biblical origin, with certain rabbinic modifications as they occurred throughout the ages, with full authority, of course, vested in the rabbi by the Bible.

Q Would a Jew be allowed pursuant to Hebraic law to eat non-kosher food?

A The definition of non-kosher food is critical.

Q Then I withdraw the question and I would ask you to give us a definition of non-kosher food.

A Correct. Food of animal origin is totally governed by biblical law, not only by rabbinic law, so that the consumption of improperly prepared meat products or unacceptable fish products involve a violation of biblical law, one that every Jew is required to defend unto death. In other words, no threat other than the threat of actual loss of life permits a Jew to violate these laws.

He is required by biblical tradition to forfeit all his wealth, to suffer any amount of cruel punishment rather than succumb and consume non-kosher food that has been forbidden by the Bible.

Q Do you know the defendant Rabbi Meir Kahane?

A I do, both by his reputation and because I have had personal contact with him during the summers when he has been in Israel. We share the same apartment building.

Q Are you aware of the fact that he is a practicing Orthodox Rabbi?

A To my knowledge, he meticulously observes all the biblical and rabbinic tenets of bublical Jewish law.

Q If non-kosher food were available -- withdrawn.

If Kosher food were not available in a penal institution, what would the religious dictates be upon Rabbi Kahane and his conduct with regard to the partaking of non-kosher food?

A If all he had was non-kosher food to eat, he would have to wait until his physiological state, his vital signs would so be determined by competent medical authorities that he is in danger of dying -- then and only then could he partake of food.

Q Now, which food requires supervision with regard to whether it is kosher or non-kosher, and how is that determination made?

A This is one of the truly complex areas in light of modern technology, modern food technology, one that occupies much of my time.

It may not be well-known to this Court that so simple a product as bread in America is largely forbidden by biblical law to anyone who observes the Jewish tenets.

Most bread is baked with shortening, most shortening used commercially is either pure animal shortening or a mixture of vegetable or animal shortening, or the pans in which they are baked are greased with an animal shortening, so-called release factors, which makes the bread absolutely forbidden except, as I said, if necessary to save one's life.

So that something as simple as bread becomes unavailable to the Jews. A salesman traveling has a major problem and will take along with him kosher bread so that he can have something to eat along the way.

Likewise, what may not be well-known to the Court is that so simple a vegetable product as stringbeans or carrots or corn cooked in a pot which was previously used for cooking non-kosher food becomes forbidden to the Jew by biblical law, not only by rabbinic law, but by biblical law, again under the same threat -- he must not eat under Jewish law unless to save his life. But until his life be endangered, he is required to subject himself to the cruelest treatment and not to succumb.

Q So therefore, if Rabbi Kahane were to be a religious Jew, he would then not be able to eat until there was a determination that he faced the moment of death; is that correct?

A That is very accurately said.

Q With regard to the basic preparations of foods, are there any special circumstances surrounding the preparations of food that might make it non-kosher? For example, I would assume that an orange would be a kosher item, without question. Is that correct?

A I don't think this is the place for a detailed analysis of Kashruth laws, but even an orange could be non-kosher. But by and large I would agree, yes, it is possible to state that with rare exception an apple and an orange and a banana not prepared in any way, that is, not cut with

an un-kosher knife, would be acceptable to people observing the Torah law.

Q Well, if a knife were used to cut an orange or an apple, would you have to make a determination whether that knife was a knife that was within the tenets of Kashruth or could any knife be used to cut an apple or an orange?

A No, by no means. It would have to be a knife that was free of contaminating non-kosher food, and that is a ritual determination.

Q With regard to the preparation of food, let us first go into the area of knives, forks, pots and pans.

Are there any special laws or restrictions with regard to those items, and if there are, where are these restrictions based and where do they come from, pursuant to the religious aspects?

A The laws governing the Kashruth of utensils are verses in the Bible, in the Five Books of Moses. There are laws of purging the vessel, so-called, the laws of purging vessels of non-kosher food that are well-known to every Jewish housewife who might accidentally use a dairy spoon for mixing a pot of chicken soup -- she knows very well that she must go through a complex procedure, consulting the Rabbi and finding out how to restore that spoon to its original acceptable state.

So that actually all vessels, unless they have been under supervision by people who are cognizant and sensitive to the laws of Kashruth, are assumed to be unacceptable.

Q You mentioned a dairy spoon. What is a dairy spoon?

A All right. I am sure the Court is familiar with Orthodox traditions that meat and dairy products must not be mixed in consumption or in cooking, of course, and likewise, utensils must be kept separate so that in every Jewish home that has any semblance of observance of Jewish law and tradition, there are double sets of dishes and utensils; one for meat and one for dairy and, of course, a separate complete set for the Passover use.

Q Now, is a Jew who is incarcerated, is he to be held under the same strictures, that he cannot use utensils unless they are handled and supervised in this specific manner?

A Incarceration introduces no variance in the life-style of the Jew.

It is unfortunate even to consider the possibility that an Orthodox Jew needs to be incarcerated, but, nevertheless, if such an event should occur he is bound fully without exemption by all biblical and rabbinic law.

Q Now, for example, if a meat spoon is used with

meat products, but those meat products are not kosher, can that spoon be used in utilization by a religious Jew?

A Of course not.

Q We discussed kosher meat, is that correct?

A Correct.

Q And kosher food products. Is there such a discussion in Jewish law?

A Much of Jewish law concerns itself with Kashruth laws. The preparation of meat for the Jew is a uniquely complex procedure which begins at time of slaughter, method of slaughter, method of preparation, the dissection of the meat, removal of various blood vessels, the fat streaks, et cetera, which gives rise to the whole institution of the shochet, the butcher, the kosher butcher, which occupies much of the concern of the State Kashruth Commission which advises the Department of Agriculture on anti-fraud legislation to protect the American citizen who wants the guarantee that when he buys a kosher product it is indeed kosher, with special emphasis on meat products.

Q You are a teacher of Talmudic law at Yeshiva University, is that correct?

A Correct.

Q Would you describe for the record what the Talmud is?

A The Talmud is the repository of Torah law. It contains all of biblical law and the subsequent rabbinic modifications in accord with biblical principles, of course.

So that we have, I use the analogy, a structure of constitutional law being the Bible with the subsequent development of the constitution representing the rabbinic edicts that allow the law to be practiced by the Jew, with special consideration to enforcement and to implementation.

Q Are there sections and precepts of the Talmud that discern and discuss Kashruth?

A Of course. Many verses in the Bible and whole tractates of the Talmud are devoted to it.

MR. SLOTNICK: I would ask the Court to take judicial notice of the Talmud as a legal anthology.

THE COURT: Which one, the Babylonian or the Palestinian? How would you like it noted?

THE WITNESS: If the Judge would permit me to answer that question, the Babylonial Talmud has precedence when there is conflict. When there is no conflict with the Talmud they are both equally binding.

THE COURT: Do you want me to judicially notice both of them?

THE WITNESS: I think as long as you are noting judicially, you might as well.

THE COURT: The Court will judicially notice them, in the absence of objection.

BY MR. SLOTNICK:

Q Are you aware of any precedence in which Orthodox Jews have been sent to jail?

A You are referring to historical precedence or current precedence? Unfortunately, I am aware of both.

Q Let's discuss historical precedence. Are you aware of any such precedence?

A There are a number of surprising references in the Talmud itself to the conduct of one of the great rabbis of the Talmud, Rabbi Akiva, who forfeited an essential amount of water at a time when obviously he was on limited rations in prison awaiting death, and used the water to ritually wash his hands before he partook of the food, because the absence of the ritual washing of the hands also presents a prohibition that is relevant to dietary laws.

So that the reference is of course -- all stories of the Talmud are not there to amuse but only to instruct, and this is, of course, an example of the lack of exemption that comes because of the emergency conditions involved in incarcerations.

(Continued on next page.)

Q Are there any other such precedents that you are aware of to illustrate the conduct or what is expected of a religious Jew or what is required of a Jew who is incarcerated?

A If I would use the word incarceration -- if I would interpret the word incarceration a little loosely and refer to the central incarceration of thousands of Jews in the Russian and Polish army during the time of the czar, we have a major reference work wirtten by possibly the greatest Halachic authority of the last generation, the Chofetz Chaim, as he is known, one noted for his compassion and sensitivity to human suffering. He wrote the famous text Machana Israel, essentially a Jewish encampment, a Jewish camp, in which he instructs the Jewish son who is being drafted into the Russian-Polish army how to conduct himself.

There he has a major section on dietary restrictions while in the Army, and essentially says in his own unique style of compassion that he should look upon this period as one of great trying, testing of his fundamental faith in God, but that man, the man so incarcerated is required, first, to spend every penny he owns selling his extra pair of pants and shoes to provide himself with funds so that he can buy kosher food, and

when these run out he is to limit himself just to a crust of bread and canteen of water up until thepoint where he feels his life forces are ebbing, and then, and only then may he partake of nonkosher food.

Q In order for food to be deemed kosher, must all of the ingredients be kosher or clean or can just some or a majority of the ingredients be kosher or clean?

A There is no concept of a little bit kosher, like there is no concept of a little bit pregnant.

Q Also, in order for food to be kosher, must it be prepared under strict Rabbinical supervision?

A No. They must be prepared under strict Kashruth supervision. A rabbi need not be the one who supervises, but it must be supervised by one who personally observes the dietary laws and is knowledgeable about the dietary laws, with special concern for modern times when you need practically a Ph.D. in chemistry in order to understand what is put into a simple candy bar.

Q So, in other words, if the chef at a Federal prison were Jewish, but unaware of the precepts of the Talmud, would he be considered a proper party to give the food proper supervision with regard to the feeding of a Jewish prisoner?

A By no means. No more than a chef in any

restaurant outside of prison could be so trusted.

In fact, if I may comment, it would be uniquely dangerous to have a Jewish chef for plus his lack of knowledge there is often involved a failure of reminiscence.

Most Jews had orthodox parents, certainly orthodox grandparents, and it is astounding to my personal experience to note what errors of recall can occur when someone who has personally left the traditions of his faith and is trying to remember what he saw in his ancestral home, so that there be a special concern about a Jewish chef who is undertaking to provide kosher foods for a strictly observing prisoner.

Q As an example, fish is basically a kosher product, is that correct?

A Oh, that is incorrect. Kosher fish is a kosher product.

Q Would you define the term kosher fish?

A Right. As you know, a Jew can't eat shellfish; a Jew cannot eat the Southern delicacy catfish; we cannot eat sturgeon; we cannot eat swordfish. The only kosher fish, if I might use a biological term -- the Judge will excuse me, I am also a chairman and professor of the Biology Department Yeshiva University -- only a fish that

has two types of scales, stenoid and cycloid, those two types of scales are referred to in the Torah as kaskesses. These are the only fish that may be consumed by the Jew. Any other fish is as nonkosher as pork, In fact, it incurs greater violation of biblical law than the eating of pork. The eating of pork involves a single transgression. The eating of nonkosher fish involves either four or five transgressions.

Q Assuming that stenoid or cycloid scaled fish were to be brought to a Federal institution, would that resolve an issue with regard to fish and its being kosher?

A The Kashruth of a product is determined not when it enters the prison. The problem of getting the fish from the prison commissary to the mouth would involve extensive supervisory controls and, of course, understanding and with knowledge of Kashruth law, for if this fish were put on a grill that was used in the prison, it would come out a treifa fish, a nonkosher fish.

Q Why do you say that, sir?

A Because the biblical law states that if a kosher product be subjected to heat treatment, cooking, broiling, baking in an oven nonkosher, or in contact with a nonkosher vessel or grating, it becomes automatically nonkosher.

Q That oven would be nonkosher if it were used to cook both meat and or dairy or nonkosher items?

A No, just nonkosher meat or nonkosher fish, if that were used on that grill.

Q So therefore, there might have to be a special manner of cooking that fish?

A Correct.

Q May we for the record indicate that fish is an example or analogy of all food?

A Correct. If you roasted a potato on the same grill, the potato would come out nonkosher.

Q Assuming that there was a method taken in the cooking of the fish whereby it was approved by yourself, and I presume that there is a way that that can be done so the fish would at that point maintain its Kashruth

A Oh, yes. I traveled in Japan and did very well eating the fish, yes. There are ways to do it.

Q Would you for the record indicate the ways that it can be done?

A The fish would have to be wrapped in two wraps of aluminum foil and sealed so that it would be opened by the consumer.

Under those conditions it would be permissible to prepare the fish on any kind of grill.

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Q Are you aware of any other manner and method in which the fish could be prepared so that it would maintain its aspect of Kashruth, assuming that it were placed in an over in a prison?

A Not unless the oven were purged, were made kosher and kept kosher during the entire stay of the prisoner, or a food will be brought in from the outside, naturally, prepared as, for example, is done in every airline, in every Holiday Inn in the country now.

Any Jew can receive by 24 hour prior notice, can receive fine meals that are prepared just that way, in aluminum trays that are wrapped in aluminum foil and put into the oven and heated so as to meet the maximum standards and minimum standards of Kashruth. There are no minimum or maximum, there is only one standard.

Of course, if one were to maintain what is called to be a kosher kitchen, without going into that, in a Federal penitentiary, that would be sufficient with regard to the cooking of the fish, is that correct?

Q We are using the term kosher kitchen meaning -- assuming that it fits all the precepts of Kashruth.

A Naturally.

Q Would there haveto be two kitchens or would one be sufficient?

A There would be one kitchen. Naturally, there would have to be two sets of utensils properly marked and properly separated.

Again, the key would be the individual controlling the kitchens, his knowledge, his commitment and his integrity would be the key tothe successful running of such a kitchen.

Q Now, after the fish leaves the oven, it then would have to be placed on a platter, or it then may be placed on a platter.

Would the placing of the fish on a platter cause that now to become nonkosher?

A If the platter is used for nonkosher food, the fish would immediately become nonkosher. But, of course, as you recognize, you can use disposable platters, paper, aluminum, which of course would not involve that problem.

We are referring to platters that had previously been used for nonkosher food.

Q Then I presume, also, with regard to utensils--

A Correct.

Q And also with regard to eating surfaces.

A Correct. Eating surfaces? You are referring to the table?

Q That's correct.

A No, that would not be a fully accurate statement.

In other words, a clean eating surface upon which you place a platter, upon which you place food, the eating surface would not affect the Kashruth of the food.

Q What about the knives and forks that were placed on that eating surface?

A If the eating surface were clean, I mean hygienically clean, and, of course, dry and not hot, there would be no problem.

Q You are aware of the servitude of Orthodox Jews in the army, as you testified to.

A Yes.

Q Are you aware of the fact that they have been able to receive kosher food?

A Surely.

Q Are you aware of the fact that institutions in the City of New York serve kosher food?

A Surely.

Q Are you perfectly satisfied by the fact that kosher food could be supplied to a prisoner without great problem to the authorities?

A I think if there were just the slightest

desire to meet the special requirement, it could be met with -- not with minimum difficulty, with no difficulty.

As I said, the American society has become a mobile society. We run around all over the world. Orthodox Jews do likewise and involve themselves in all professions, et cetera.

Every time there is a scientific convention there is always a section of the dining room set aside for those who eat kosher food. Kosher food is provided by a number of industrial organizations that make a living out of this, providing the airlines and steamship lines and bus companies and travel agencies, and there is -- it is a readily available commodity. Every hospital stocks it in its freezer so that a patient coming in unannounced by morning can have his kosher meals.

It presents literally no difficulty in a modern commissary where there is a freezer, where you can stock several dozen of these TV type dinners.

It is really essentially a TV dinner that has been prepared under careful Kashruth supervision, which is heated in any oven and provided to the patient, prisoner, guest, so that he opens, breaks the seal himself and eats with plastic disposable utensils.

Q Is there difficulty with regard to the TV

dinners on the Sabbath?

A Yes. The Sabbath would present a very unique problem because if the dinner were heated on the Sabbath it would become "unkosher" for an Orthodox Jew to partake.

There would have to be special arrangements made to permit a type of dinner prepared that can be eaten cold.

Q Such as?

A Such as chicken salad, et cetera; that could just be put in the refrigerator from the freezer, allowed to thaw and served. Any food that aesthetically can be eaten cold.

(continued next page)

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Q You have indicated to us that you spent some period of time in Japan; is that correct?

I didn't mean to, but I did, yes.

Q Are there any kosher restaurants in Japan?

A Under Rabinnic supervision -- yes, there is, actually. There is the Tokyo -- the synagogue in Tokyo runs a kosher dairy restaurant. One, however, run by people who are not too knowledeable and, hence, the Orthodox Jews don't eat there.

Q But you did eat in Japan, is that correct?

A Correct.

Q Did you eat nonkosher food in Japan?

A I surely hope not. It was not my intention if I did.

Q You were able to have food prepared for you in accordance with the precepts of the Talmud?

A Without difficulty, At literally every little restaurant in every little town in Japan.

Q Would you in summation indicate to us the importance of Kasruth to the living Jew?

A I think the importance is summed up by a statement I made earlier.

Up until forfeiture of life, man must forfeit everything he has, company of his wife and children,

his entire wealth, to enter into the realm of the most poverty-stricken men rather than transgress the Kasruth laws.

He is to allow himself to be subjected to torture, to physical torture, to mutilation rather than consume nonkosher food.

I hope that impresses the Court with the fact that we are not dealing with frivolous notion. It is not a question of a special dietary requirement of white wine with fish or red wine with beef. We are talking about a critical need of the Jew to relate with his God in a series of instructions that have been our mark of distinction from the days that we left Egypt so many thousands of years ago.

Q Rabbi Tendler, as a hypothetical --

MR. SLOTNICK: Your Honor, I presume that the Rabbi has been qualified as an expert, for the record?

THE COURT: Any objection?

MR. PATTISON: No, your Honor.

THE COURT: You are so qualified now in the Court, too, Rabbi.

THE WITNESS: Thank you.

Q Rabbi Tendler, if hypothetically Rabbi Tendler

was incarcerated in a prison or in an army, pressed into service, at what point would he partake of nonkosher food, pursuant to the religious laws that Rabbi Tendler is aware of?

A I told you, my field is macrobiology. I teach physiology. I can give you vital signs, as per drop of blood pressure. There would have to be a certain increment in respiratory rate to indicate that the individual is now under physiological stress. At that point where man's vital signs are being modified, at that point, and only at that point, he would be required by Jewish law to partake of the nonkosher food; again, in accordance with Jewish law.

At no time is h exempted, from the day he is born, and I may comment, from the day he is conceived until the day he dies, not brain death but heart death -- he is governed by Jewish law. There is never a time when he is exempt therefrom.

Q There are various sects of religious Jews, are there not?

A No.

Q Do you consider yourself an Orthodox rabbi?

A I consider myself as doing my best to maintain the standards of orthodoxy. I am sure they are not fully

adequate, but I do my best.

Q Have you a history of rabbis in your family?

A My own family? We boast of as far as we can trace back. We can't recall a generation that did not have a rabbi in the family. And I also boast already of my generation's. I have already given rise to one who is ordained as a rabbi.

Q Other than a history of rabbis in your family, you have a father-in-law who is a rabbi?

A Yes.

Q What is his name?

A My wife's father is the noted Moshe Feinstein, shlita, who is recognized, I believe, by all "sects of Judaism" as the single most authoritative voice of Halachic Judaism in the world today.

Q Have you had a conversation with him surrounding the issue of whether a prisoner may partake of nonkosher food, in his expert capacity and in your expert capacity?

A If I might answer you with candor, I did not have a discussion with him about it because it would be somewhat demeaning to me to let him think that I had a doubt about the Halachic ruling in such a case.

With Rabbi Feinstein you discuss things that

are "difficult and complex." There are certain things that we speak of in Talmudic language, things that kindergarten children know which don't enter our discussion.

The comments I have made I think to you on the validity of Kasruth law for the prisoner, categorical imperatives involved, are not subject to any dispute or question. However, I did tell him of thefact that I was coming to the Court to present this for the Court, and for the lawyers of the Government, so they may understand the religious restrictions that govern us, and he was kind enough to give me in his own handwriting, delivered this morning -- that's why I was a few minutes late -- give me a short letter which he asked me to submit to the Court as an authoritative ruling by Rabbi Feinstein, as I say, who is without doubt the individual who would be classified by the Court as a judge's judge, a man to whom every difficult issue finally comes for resolution.

Q Has he written books?

A He has written five volumes involving several hundred, actually thousands of responses to rabbis all over the world who turned to him with special emphasis on biblical law as it affects modern times, as it affects changes in scientific knowledge and in technology.

Q Do you recognize him as one ofthe leading

experts on Talmudic law in the world?

A I speak with some bias and under some threats because I have to go home to my wife -- yes.

MR. SLOTNICK: May I have this document marked for identification.

THE COURT: Show it to counsel. If there is no objection it should be marked as --

MR. SLOTNICK: Your Honor, it is written in Hebrew.

THE COURT: Pursuant to rule 703.

MR. PATTISON: No objection.

THE COURT: Rabbi, if you will be so kind as to translate it for the record so the Court will understand.

Mark it in evidence.

THE CLERK: Defendant's Exhibit A in evidence.

(So marked.)

Q This is unquestionably a letter from Rabbi Moses Feinstein, is that correct?

A I would suspect that every student of the Yeshiva would recognize that handwriting at ten paces.

I would ask the indulgence of the Court, I would not undertake normally to translate a technical letter for the Court without sitting down first with paper

and pencil and checking the words, but these are the words of my father-in-law with whom I have much conversation, and whose writing style is very familiar to me.

He addresses this Molush Kodish Soshvay ha Shofat -- basically to your Honor, the most worthy judge.

In our holy Torah we have been commanded by God, may his name be blessed, that it is forbidden to eat forbidden foods even if it means suffering hunger and great pain for very lengthy periods, up until this reservation "that he die not therefrom." And, therefore, even if evil people shall compel a Jew with torture and threat that if he does not eat they will continue this torture, or they ask from him ransom of all the money that he possesses, and only under those conditions will they let up and not compel him to eat nonkosher foods, it is forbidden for him to eat the nonkosher food as long as they do not kill him.

Therefore, even if one is incarcerated in a prison and has nothing to eat, except for nonkosher foods, he is forbidden to eat these foods but is required to undertake the stress of great hunger and great pain.

I have heard that some member of the Reform Movement has ruled that in a prison it is permitted to eat nonkosher food. I assure you that this is only because the individual believes not in our holy Torah, that he is

a man who obviously had no empathy for his fellow man and certainly is one that is not -- or he is one who is just totally not knowledgeable about the laws of the Torah which bind us, the Orthodox, who are committed to observe the Torah.

It is inconceivable to me, Rabbi Feinstein says, that in our country, the great United STates, where if one man is punished, a punishment of incarceration in a prison, which is in itself a great punishment, even if they should provide him with the kind of food that he may eat, that they should add to this great punishment the additional punishment of hunger and anguish, physical anguish to add punishment to punishment, a punishment, a secondary punishment that has not originally ordained against this man.

I strongly feel that this is in total violation of the conduct of our great United States that is praised throughout the world that its ways are ways of gentleness and its laws are laws of righteousness.

To these words I sign my name on this 12th day of the Jewish month of Nisan, the year 5735 here in New York in the name of truth, justice and charity, Moshe Feinstein.

MR. SLOTNIGK: I offer that as an exhibit on

behalf of the defendant Rabbi Meir Kahane.

THE COURT: It is already admitted.

MR. SLOTNICK: Thank you.

I have no further questions of this witness, your Honor.

MR. PATTISON: Your Honor, I have no cross-examination.

THE COURT: Thank you, Rabbi. You have been very helpful.

(Witness excused.)

THE COURT: I have another matter. YOu can all remain as you are because this will only take a few moments. I have a case that has been settled.

(Recess.)

THE COURT: Call your next witness, please.

MR. SLOTNICK: Rabbi Henry Siegman.

R A B B I H E N R Y S I E G M A N , called as a witness, having duly affirmed, testified as follows:

MR. SLOTNICK: May we approach, your Honor?

THE COURT: What is the problem?

MR. SLOTNICK: It is my understanding that Rabbi Siegman has been called as an expert by the Court, and I think the record whould be clear as to that.

THE COURT: Yes.

MR. SLOTNICK: We consent to it, your Honor.

THE COURT: All right. You conduct the examination, however.

DIRECT EXAMINATION

BY MR. SLOTNICK:

Q Rabbi Siegman, would you give us your present title and background, please?

A I am the Executive Vice President of the Synagogue Council of America, which is the group organization for the Orthodox, Conservative, Reformed branches of American Judaism; both its national rabbinic groups and its lay synagogal groups.

MR. SLOTNICK: I would that he be qualified as an expert, and we do consent.

MR. PATTISON: We will not object, your Honor.

Q Rabbi Siegman, you have had experience in the Army as a chaplain, is that correct?

A That is correct.

Q When you commenced your chaplaincy, where were you stationed, sir?

A When I commenced it, I was stationed at Camp Kilmer.

Q Did there eventually come a time when you

went to a camp and established a kosher kitchen in the Army?

A Yes. I went from Camp Kilmer overseas during the Korean war and upon my return from Korean I was assigned to Fort Leonard Wood, Missouri, where I established a kosher kitchen for Jewish personnel.

Q Would you tell us the point and purpose of doing that, sir?

A The point and purpose was to make available kosher food for observing Jewish personnel who wanted to take advantage of it.

Q How were you able to establish the kosher kitchen?

A By going through official Army channels and requesting that a structure that was used as a kitchen and a dining room be made available exclusively for this purpose. I was granted that permission and I brought in some rabbinic experts from St. Louis who kosherized, in quotes, the facilities, and we were able to serve at least one kosher meal, one kosher meal a day in that kitchen.

Q Has your organization or have you as an executive of the Synagogue Council of America had contact with the Federal Bureau of Priscns with regard to setting up kosher kitchens or providing kosher food?

A The Synagogue Council of America has had an ongoing relationship over a number of years with the Bureau of Prisons, specifically for the purpose of designating Jewish chaplains to serve Federal criminal institutions

We have done so over a period of 15 and perhaps 20 years or more. In addition to which, we have in serving these chaplains, we have on their behalf contacted the Bureau of Prisons and sought to make available kosher facilities and other religious services.

Q And with regard to kosher facilities, what have you sought to do in that area?

A Well, we have on several occasions requested specifically during the course of our discussions and negotiations with Bureau of Prisons that kosher facilities is a matter of right and procedure and should be made available to Jews who observe Kasruth.

We have not succeeded in this and there is an extensive correspondence in our files on this particular subject.

(continued next page)

Q So, therefore, at this time you have gone through the administrative channels of the Borough of Prisons in attempting to set up kosher or Kasruth for Jewish prisoners, is that correct?

A That is correct.

Q And you have been refused?

A That is correct.

Q Has your organization commenced any litigation in any Courts surrounding this issue?

A We have not. We have tried to support legislation which would have that same effect, and last year, Congressman -- Senator Mathius introduced legislation that would accomplish this, and it had the active support of the Synagogue Council of America.

To our regret, however, the legislation did not pass.

MR. SLOTNICK: May I have this marked for identification, your Honor?

THE COURT: I will take judicial notice of it. Mark it as a Court Exhibit.

Q I show you a pamphlet labeled HR2803, which shall be marked as Court Exhibit number 4.

THE CLERK: So marked.

(So marked.)

Q (continuing) -- and ask you if you would turn your attention to page 5 of Court Exhibit number 4 and read lines 23 and 24 to the Court.

A "Food preferences based on religious or ethical grounds shall be honored."

Q And is this proposed Omnibus Penal Reform Act the legislation that you have referred to?

A Yes.

Q Are you aware of the fact that Congress to date has not acted upon that legislation?

A Yes, I am aware of that.

Q And is presently in committee?

A Right.

Q Rabbi Seigman, you have heard the testimony of Moses Tendler, the preceding witness?

A I did.

Q Would you recognize him as an expert in the field of Kasruth and Dietary Law?

A I do, indeed.

Q Is there anything that he testified to with regard to the Dietary Laws, Jewish Dietary Laws that you disagree with?

A No. May I add, I do not consider myself an Halachic expert of his stature.

Q But you do consider Rabbi Tendler as one?

A 109

A Absolutely.

Q Have you heard of Rabbi Feinstein?

A Yes.

Q Are you in the same position of acclaim of Rabbi Feinstein as Rabbi Tendler was?

A I agree with Rabbi Tendler that he is one of the preeminent Halachic authorities of our generation.

Q Is there anything that you heard during the course of Rabbi Tendler's testimony with regard to the Jewish Law that you disagree with?

A No, there isn't anything.

MR. SLOTNICK: Your witness.

MR. PATTISON: We don't have any cross-examination.

THE COURT: Thank you, Rabbi, for coming down.

(Witness excused.)

THE COURT: Next witness.

Rabbi, would you mind waiting here for a moment? I have one technical problem.

R A B B I S O L O M O N S H A P I R O , called as a witness, having first duly affirmed, testifies as follows:

THE COURT: Proceed, please.

DIRECT EXAMINATION

BY MR. SLOTNICK:

Q Rabbi Shapiro, you are, is it correct to say, an ordained orthodox Rabbi?

A Yes, I am.

Q Do you preside over a synagogue?

A Yes. I am Rabbi of Congregation B'nai Abraham of East Flatbush in Brooklyn, and I also serve as the Senior Jewish Chaplain at Kingsbrook Jewish Medical Center, and Senior Jewish Chaplain at Kings County Hospital, which is a hospital corporations medical center.

Q The two hospitals in which you are a Chaplain of, do they afford the right of a Jew to have kosher food, to your satisfaction?

A Kingsbrook Jewish Medical Center is a strictly kosher institution.

Q In which non-kosher food is not served?

A Where non-kosher food does not enter the building.

Q Let's go to Kings County Hospital. Are Jews allowed the right of kosher food at Kings County Hospital?

A Yes, they are.

Q Are you also aware of the fact that non-kosher food enters Kings County Hospital?

A Of course. The kitchen at Kings County Hospital is a non-kosher kitchen.

Q Have you been in other institutions in which they

have had non-kosher kitchens?

A There are many institutions in the city of New York that have non-kosher kitchens, and yet recognize the needs of a Jew, and provide him with a pre-packaged kosher meal.

Q And is that kosher to your satisfaction?

A The meals provided to the patients at Kings County Hospital, both the physically ill, the acutely ill, the prisoners, and the mentally sick, receive a kosher package that is within the framework of Jewish Law, and is therefore acceptable to any orthodox Jew.

Q Does the kosher package that you testified about, does it enter the hospital, and is it served, and eventually, as Rabbi Tendler said, does it reach the mouth of the patient in a kosher manner?

A From the moment the food reaches the institution, until the time the patient, with his own hands, or a relative of his, opens the package for him, it is prepared within the framework of Jewish Law. And at no time can it become non-kosher during that period.

Q How are you aware of that?

A Because the packages remain sealed in a dual tinfoil wrapping from the moment it enters into the hospital until it reaches the patient's bedside.

Q By the way, is Kings County Hospital a municipal

hospital?

A Kings County Hospital is a municipal hospital, yes.

Q Are you aware of the fact that the City of New York provides kosher food to other institutions, and that Kings County Hospital is not an exception to the rule?

A Yes, I am.

Q Do you know who pays for the kosher TV dinners that you have testified about?

A I believe that this money comes out of the City budget.

Q Have you had occasion to be in the kitchen of Kings County Hospital and observe the entrance of the food into the kitchen, its preparation and final delivery to the patient?

A Yes.

Q Would you desc ribe to us in a narrative exactly what you have seen, and why you describe the basis for it as being part of the precepts, and proper under Kasruth?

A The food comes in in sealed cartons, with a kosher seal on top of the box. They are placed in our freezer.

Q When you say, "our freezer," is there a separate freezer?

A The general freezer of the hospital.

Q Does that placing of the food in a freezer where there is non-kosher food make that food unclean or unkosher?

A If the food is in a sealed container, and does not -- and kosher food does not come in direct contact with non-kosher food, then it is perfectly permissible to place it in the same freezer.

Q So therefore, Kings County Hospital was not caused to have purchased a separate freezer?

A No.

Q So the food is now placed in the freezer. Tell us what else happens.

A The food is placed in a freezer. The carton is placed in a freezer. Each dinner is individually dual-wrapped with two sheets of tinfoil, and so sealed.

Q Do the dinners bear a name, by the name; is there a commercial company?

A There are several commercial companies that are acceptable to the orthodox Jewish consumer.

Q Could you, for the record, indicate the names of several of the companies?

A We use Schrieber's; there is a Welton Company in Manahattan; and there is a Cross Company that makes the dairy TV dinners.

Q Are these companies proper for intake by one who

would only eat kosher food?

A Yes. It's been so recognized by all Rabbinic Authorities, because in their commissary these companies purchase only kosher foods. The preparation of the food is done by people who are knowledgeable of the Laws of Kasruth, plus the fact that many of them have a supervisor, or as we call him, a Mashgiach, on the premises.

Q So, for the three companies you have mentioned, you are satisfied?

A Very well satisfied.

Q Is there a Board or Boards of Rabbis who determine which of these commercial companies are properly supervised and properly deliver packages containing kosher food?

A This becomes a very difficult question to answer, because an orthodox rabbi who is so ordained, is knowledgeable of the Laws of Kasruth, and if he determines that a product is kosher, it is usually accepted by his colleagues.

Q So, for example, Schrieber's, Cross, Welton, the three that you have mentioned, they have the endorsement of orthodox rabbis, and orthodox organizations; is that correct?

A Yes.

Q And you are able to rely upon that endorsement?

A Correct.

THE COURT: Excuse me, Mr. Slotnick, at 12:00

o'clock I must bring in this other jury, and I will be working with that jury. I won't be able to get back to your case until 1:30. So if you will bear that in mind in your examination, please do.

I know you are busy, Rabbi, and perhaps you can bring it to a close shortly. (Addressing Mr. Slotnick)

MR. SLOTNICK: I will try and do that, your Honor.

BY MR. SLOTNICK:

Q When the dinner leaves the freezer, what happens to it at that point?

A When the dinner leaves the freezer, it is heated in the stove. And, by the way, we have at Kings County Hospital in one stove that is used for no other purpose but to warm up the kosher TV dinners.

Q And that is provided by the City of New York?

A And that is provided by the City of New York.

Q Is that a big gas stove?

A No, it is a Convecta oven.

Q Could that kosher TV dinner be heated in a regular stove in which the other food is?

A As outlined previously by my colleague, Rabbie Moses Tendler, I believe you have it on record already that it can be heated in the same stove with certain provisions.

Q Does the food, when it is removed from the stove,

is that delivered then directly to the inmate or the patient?

A Yes.

Q Are there utensils --

A The utensils we use are the disposable type of utensils, because, as you are already familiar with, the Jew is not permitted to use a non-kosher utensil.

Q Do these utensils come as part of the kosher TV dinner package?

A No, not all the time.

Q But they can or they cannot be purchased separately?

A They can come with the total package, but we also provide a sufficient amount of disposable dishes from the hospital, at the expense of the City.

Q And the dinners contain meat, vegetables; is that correct?

A A meat dinner contains meat and vegetables.

A dairy dinner would contain the kosher fish and the vegetables, and whatever else goes with it.

Q In your observation as Chaplain of Kings County Hospital, does it appear to you that there is any greater fuss or bother attendant to processing and maintaining kosher foods and providing kosher food than the normal dinners that are given to the other patients?

A Well, each institution is geared to take care of special diets. There is the salt-free diet, the cardiac diet, the diabetic diet. So the kosher diet presents no problem to our diet kitchen.

Q And it is rather simple, is that right?

A Very simple. It comes down as an order from the physician, who so instructs the Food Director that this patient is to receive a kosher dinner, and --

Q Is that done for medical reasons or for religious reasons?

A You have touched upon a very interesting aspect of the Laws of Kasruth, because when a man is deprived of his religious observance, it affects his health and his medical stability, and that doctors have recognized.

Q You've heard Rabbi Tendler testify originally. Is there anything that he said with regard to any part of his testimony that you would disagree with?

A Not at all. He followed the line of code of Jewish Law to the nth degree.

Q Do you share the same esteem that he does of Rabbi Feinstein?

A Without a question or a doubt. He is the greatest Rabbinic Authority alive today.

MR. PATTISON: No cross-examination.

THE COURT: Thank you very much, Rabbi.

We are going to have to take a break until 1:30.

Has kosher food been provided for you, Rabbi Kahane?

THE DEFENDANT: No.

THE COURT: Mr. Slotnick, you can take custody of him solely for the purpose of supplying him with a kosher meal, and have him back here at 1:30.

MR. SLOTNICK: Thank you, your Honor, I will.

(Luncheon recess taken.)

T1R1 fls

(continued on next page.)

AFTERNOON SESSION

(1:45 p.m.)

MR. SLOTNICK: Your Honor, the next witness we will call will be Julius Schreiber.

JULIUS SCHREIBER, called as a witness, first duly affirming, testified as follows:

DIRECT EXAMINATION

BY MR. SLOTNICK:

Q Mr. Schreiber, will you tell us your business or occupation.

A My company, Schreiber Caterers, makes frozen dinners which are used by various institutions.

Q You say frozen dinners?

A Kosher.

Q Excuse me, sir?

A Kosher.

Q Frozen kosher dinners?

A Under the supervision of the Orthodox Union of America.

Q When you say the supervision of the Orthodox -- what is the full name of that, sir?

A Union of Orthodox Congregation of America.

Q Do you have what is known as glatt kosher?

A Yes.

Q And do you also have what is known as parave

or non-meat or dairy?

A Yes.

Q What institutions have you supplied in the past with regard to your kosher TV dinners?

A Airlines, steamship lines, railroads, hospitals, U.S. Armed Forces, nursing homes, colleges.

Q Have you ever provided any, other than the Armed Forces, any municipal or federal institutions with --

A Yes, state and city and county institutions.

Q Mr. Schreiber, slowly, if you can recollect, which state institutions have you provided food for?

A State mental health institutions.

Q And federal institutions which you have provided kosher food for?

A Armed Forces.

Q And municipal institutions?

A Yes, city hospitals.

Q Now, generally speaking, have you ever provided the City of New York --

A Yes.

Q Do you receive a contract from the City of New York?

A Yes, a bid. Twice a year you bid.

Q Would you please tell us how that came about,

how that occurred and the result of it and who signs the contract and how you get paid.

A Well, there is a bid put out by the City of New York twice a year.

Q For what, sir?

A For kosher frozen dinners. They specify the ingredients, the weight and you apply and give the price and they give you an estimate of how much they might need. There are about 20 institutions involved.

Q You have at times had the contract with the City of New York, is that correct?

A Yes.

Q And are you paid by the Comptroller of the City of New York?

A Right, by the City of New York, Comptroller, Department of Hospitals. I'm not exactly sure who it is.

Q Do you distribute your frozen kosher TV dinners throughout the country?

A Yes.

Q Would you tell us some of the places where you have distributorships?

A Boston, Philadelphia, Miami, Pittsburgh, Harrisburg, Chicago, Los Angeles, Houston, Texas.

Q Do you know where Allenwood Penitentiary is?

A I know it's in Pennsylvania.

Q Harrisburg is in Pennsylvania?

A Yes.

Q When you say you have a distributor, would you indicate to us how your contact with the distributor operates?

A The distributor goes to the institutions and offers them the meals, and he offers them in large quantities and sells them to the institutions involved.

Q What is the process by which your food is prepared and how is it received by the institution?

A We cook and dish out dinners in aluminum foil containers. They are sealed and wrapped according to the instructions of the rabbi who is present at all times.

Q You have a rabbi present at all times on your premises?

A Yes.

Q Continue.

A And then they blast freeze it in our plant and they are taken to a public freezer warehouse.

The distributor who needs these dinners calls us up and we send them from the warehouse, a hundred cases, whatever, that we might need and he picks it up and takes it to his plant and stores it there and then sells it out of his plant as needed.

Q You also have a central distribution point in the City of New York?

A Yes.

Q And you also distribute in the City of New York?

A Yes.

Q Frozen kosher TV dinners, is that correct?

A Yes.

Q Do you presently have the contract with the City of New York for the distribution of --

A No.

Q Is there someone else who does?

A Yes.

Q Do you know their name?

A I believe it is Borenstein.

Q Would you describe the packaging of your product.

A The package is in compartment aluminum foil tray, covered with an aluminum foil cover, sealed, inserted in an aluminum foil bag and then re-sealed again.

It's done under the supervision of the Federal Department of Agriculture. There are inspectors in our premises at all times, too, and each package bears the seal of the U.S. Department, Federal Department of Agriculture.

Q When the frozen dinner is to be prepared, are

there any special processes which are needed in order to cook this meal?

A It has to be reheated for about 45 minutes in a hot oven without opening the seal. And plastic -- we provide sealed plastic cutlery.

Q That was my next question.

Do you also provide utensils which can be used?

A Yes.

Q And these are of a throw-away type, is that correct?

A In a sealed bag, separate bag.

Q And your company has been found to be properly accredited to be a distributor of kosher foods, is that correct?

A Yes.

MR. SLOTNICK: I have no further questions.

MR. PATTISON: Just one question.

CROSS-EXAMINATION

BY MR. PATTISON:

Q You said that you do provide food to the City of New York, is that correct?

A Yes.

Q Contracts. Prisons, sir?

A No. Hospitals.

MR. PATTISON: Nothing further.

THE COURT: Thank you very much.

(Witness excused.)

THE COURT: Next witness.

MR. SLOTNICK: I call Rabbi schwartz.

May I have a moment, your Honor?

THE COURT: Yes. I don't want to cut you off, you take as long as you would like, but if it is going to be repetitive or if it is going to be matter that can be stipulated to, I would prefer to do that.

MR. SLOTNICK: I think that it will be rather brief, in view of the fact that he is from the organization mentioned by Mr. Schreiber.

You can tell us very briefly their procedures and the processes and also the fact that he is aware of another bill that has been submitted to the Legislature with regard to the provision -- a rather similar bill to the one that was presented as Court's Exhibit 4.

THE COURT: I am certain that the Government is not going to contest any of that.

MR. PATTISON: We are not opponents in the matter before the Court now at all.

THE COURT: The Government will stipulate that

if he were called he would so testify?

MR. PATTISON: Yes.

MR. SLOTNICK: Thank you very much, your Honor.

We would call Warden Gengler.

THE COURT: Is he here?

L O U I S J. G E N G L E R, called as a witness, first being duly sworn by the Deputy Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. SLOTNICK:

Q Warden Gengler, would you tell us your present occupation.

A I am currently warden at the Federal Detention Headquarters, New York City, New York, 427 West Street.

Q Are you familiar with the name Stuart Cohen?

A Yes, sir.

Q Do you recollect when Mr. Cohen was incarcerated at West Street?

A Yes, sir.

Q At the time that Mr. Cohen was incarcerated at West Street did he receive frozen kosher TV dinners?

A Yes, sir.

Q And would you tell us how that was accomplished?

A Frozen TV dinners were purchased from a jobber.

Q By whom, sir?

A By our purchasing agent in the business office at West Street, and were stored in the refrigerator and given to Mr. Cohen.

Q Was this done pursuant to court order?

A This was not done pursuant to court order.

Q Was this done pursuant to executive decree, or orders from Washington?

A By that you mean?

Q Orders from Washington.

A I was asked if I could -- would experiment with the program and I said I would.

Q Now, would you describe to us how you received the kosher meals for Mr. Cohen and how they were eventually received by Mr. Cohen?

A Rephrase that, please, sir.

Q How did you receive the kosher meals, from whom sir?

A They came from a jobber who delivered them to the institution; they were refrigerated and Mr. Cohen was given, as I recall, one TV dinner per day.

Q And do you know how they were heated?

A They were heated in the institution oven, as I recall.

Q Were there any special facilities that were

needed for the receipt of the kosher TV dinner for Mr. Cohen?

A None.

Q On Tuesday of this past week, was the West Street Federal Penitentiary tendered with TV dinners that were alleged to be kosher by several rabbis?

A Federal Detention Headquarters was, yes.

Q And could you tell us what you did with regard to that tender?

A My administrative assistant, Mr. Kinney was sent to the entrance of the institution, and upon instructions from me was advised not to accept those dinners that were tendered.

Q Was there a time when Mr. Cohen was incarcerated that he did not receive kosher meals?

A I'd have to check. I can't answer that question.

Q Do you remember the name Avrom Herskovitz?

A Yes, sir.

Q Do you remember his dietary requirements or what he ate while he was a prisoner at West Street?

A Yes, sir.

Q Would you tell us what he ate while he was a prisoner at West Street?

A Abraham Herskowitz followed the same pattern as

has been the policy at West Street, he was assigned to Food Service, or he was permitted to eat any items that were tendered on the main line for the restof the population.

He could also have as much of the excess food that was there as he wished. He selected from the main line. He was also given supplemental food in the way of hard-boiled eggs, occasionally cheese and on occasion sardines.

Inaddition, as I recall, monies were left in his commissary fund unit. Said monies were used to purchase fruit from the commissary and other items that he could select therefrom.

Q Are you aware that Avrom Herskovitz' diet for approximately six months was composed basically of apples and oranges?

A I'm not aware of that.

Q Are you aware of the fact that during his stay at West Street Avrom Herskovitz lost approximately 100 pounds?

A I am not aware of that.

Q Is it that you don't recollect or that you are not aware of it?

A I am not aware of it. I know Abraham Herskovitz could well have lost weight. Abraham Herskovitz was a big man.

Q And he received less food than the normal

prisoner would receive? I withdraw the question.

Did he receive any meat during the period of time that he was incarcerated at West Street?

A I don't know.

(Continued on next page.)

Q Did he indicate to you or were you aware of the fact that he was a practicing Orthodox Jew?

A I was.

Q Do you have facilities at West St.. to prepare on your own through your chefs Kosher meals?

A No.

Q Did you prepare during Avram Herskovitz' stay kosher meals? Withdrawn.

Prepare kosher meals.

A I don't understand your question. You withdrew and I have lost you.

Q I asked whether Avram Herskovitz ever ate meat while he was at West St.?

A I believe he participated in the Seder. If he was there at a Seder, he did.

Q At a Seder.

Now, during the course of the Seder, is it not the policy of the West St. penitentiary to bring in kosher food and serve it?

A It is.

Q And is it also not the policy at West St. that during specified Jewish holydays kosher meals would be brought in to the prisoners?

A Yes, true; on special holy days, right.

Q Other than the special holidays, do you know whether Avram Herskovitz partook of any meat?

A I do not.

Q The utensils and the kitchen at West St., to your knowledge is not kosher; is that correct?

A They are not kosher. We have plastic spoons and knives and forks that we use as back-up if perchance we run out of silverware.

Q But as far as the pots, the pans, the preparation of food, basically meat and dairy is mixed and non-kosher items are used; is that correct

A That's correct.

Q So it would be fair to say that food cooked at your facility could not be kosher.

A Correct.

Q Is it also fair to say that you have a working knowledge of other federal institutions within the federal system?

A Yes.

Q And would it also be fair to say that the same situation exists at every other federal installation, namely, the non-kosher dimension of food preparation?

A That's correct, that's correct.

MR. SLOTNICK: Your witness.

MR. PATTISON: your Honor, no questions.

THE COURT: Thank you very much, Warden.

(Witness excused.)

THE COURT: Next witness, please.

MR. SLOTNICK: Administrative Assistant Kinney.

THE COURT: What are you going to ask the Administrative Assistant that the warden has not answered?

MR. SLOTNICK: It would be cumulative except for the fact that refusal of food was based upon policy of the Bureau of Prisons.

THE COURT: The Warden makes the policy and he so testified.

MR. SLOTNICK: Then I withdraw and thank Mr. Kinney for coming down.

THE COURT: Thank you very much.

MR. SLOTNICK: We have Rabbi Grodner, who will testify with regard to another issue, your Honor, that is before the Court.

R E U V E N G R O D N E R , called as a witness having first duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. SLOTNICK:

Q Rabbi Grodner, would you tell the Court your

background and where you are presently employed.

A I am a rabbi duly ordained by Yeshiva University. I am presently the spiritual leader of the Young Israel of Scarsdale.

Q Did there come a time during the Passover holiday that Rabbi Kahane was a guest at your home?

A Yes. Rabbi Kahane was a guest at my home for the last two days of Passover.

Q And you were aware that was as a result of a court order?

A That's correct.

Q Would you tell us whether you observed Rabbi Kahane, and indicate to the Court your conclusions with regard to his being a religious Jew?

A I found Rabbi Kahane to be most meticulous in the observance of every aspect of Jewish law. In the area of dietary laws he insisted upon Glatt kosher meats and even in the eating of matzoh required a special shorum matzoh, which required special supervision.

Q Is it also true that Rabbi Kahane indicated to you that he would refuse or did he refuse to eat foods other than Glatt kosher meat or that special matzoh that you spoke of?

A I don't follow the question.

Q Would he refuse to partake, did he indicate to you that he would not eat matzoh that was not shorum matzoh?

A That's correct.

Q And also with regard to the meat, did he indicate to you that he would not eat meat unless it was Glatt kosher?

A That's correct, yes.

Q Do you know the reason for that preference, briefly?

A Well, I believe that Rabbi Kahane is very stringent in all aspects of Jewish law and observance and has selected the most stringent aspects of the law in his own personal observance.

Q And is that conclusion reached as a result of your observation of Rabbi Kahane in your home?

A That's correct, yes.

Q Now, may I qualify Rabbi Grodner as an expert in Talmudic law?

MR. SLOTNICK: Is there an objectionto that?

THE COURT: I don't think it is necessary. He was ordained by the Yeshiva. That is sufficient.

MR. SLOTNICK: Thank you.

Q With regard to the sabbath, I would ask you the

following question, hypothetically: If a man of Rabbi Kahane's stringency were to be incarcerated, is there any law or any precept of the Jewish faith indicating that it would be necessary for him to observe the sabbath with a minion?

A The question of minion is not specifically a sabbath law. It is a law related to prayer, and the entire concept of prayer.

A minion, or a quorum of ten males, enables a Jew to pray publicly. Aside from the public prayer, there are prayers which can only be recited in the presence of a minion.

If I may quote Maimonides, who addresses himself to the question of public prayer, in Chapter 8 of his Mishna Torah, he states as follows:

"Congregational prayer is always heard by the Almighty; hence, a person should associate himself with the congregation and never recite his prayers in private when he is able to pray with the congregation. One should always attend synogogue morning and evening for only if recited in the synagogue are one's prayers heard at all times.

"Whoever has a synogogue in his town and does not worship there is called a bad neighbor."

So, in reply to your question, I would say

that the praying with a minion is not restricted to one day a week but, rather, to seven days a week.

THE COURT: I have covered that requirement in my opinion in Wilson v. Bean.

MR. SLOTNICK: That's correct, your Honor.

THE COURT: And I don't know why we need to go into this further. If there is a sufficient number of Jewish personnel in the prison, I take it that communal prayers have to be made available. If there is not, then there will be no communal prayers.

MR. SLOTNICK: However, as part of your Honor's original order you had indicated that if there were not ten participants, that in view of the minimum security aspect of Rabbi Kahane's incarceration, he would be enabled to go to a minion if there was one reasonably near.

THE COURT: As a matter of administrative discretion, but this is not a constitutional requirement that he be released. It is a different kind of requirement, I take it. I don't see any point in going into this.

We are dealing primarily with kosher food problems.

(continued next page)

MR. SLOTNICK: Then I will indicate that perhaps we will leave that for a later moment, if necessary.

Q Rabbi Grodner, you have heard testimony of Rabbi Moses Tendler, did you not?

A Correct.

Q Was there anything that he testified to regarding the law, regarding his conclusions, his opinions, that you differ with?

A No.

Q He also presented a letter from a Rabbi Feinstein. Have you heard of Rabbi Feinstein?

A Most certainly.

Q Would you tell us whether you consider Rabbi Feinstein an expert with regard to Talmudic law?

A He is considered an expert by all segments of the Jewish community, and certainly by myself.

MR. SLOTNICK: Thank you very much.

Your witness.

MR. PATTISON: No questions.

THE COURT: Thank you very much, Rabbi.

(Witness excused.)

THE COURT: Anything further?

MR. SLOTNICK: Your Honor, we have, if necessary,

for the purposes of this hearing a dietician who can testify. However, it may not be necessary for the purpose of this aspect of the hearing.

THE COURT: I think it would be useful to have a dietician testify with respect to nutritional requirements.

MR. SLOTNICK: We would call Mrs. Esther G. Offenbacker.

I withdraw that, your Honor. It is my understanding that unfortunately she had to attend a class this afternoon. I thought she was to be here.

However, at this time, your Honor, I think the record is clear, I must ask for a stipulation with regard to the fact that there is no question -- your Honor can take judicial notice of the fact -- that Rabbi Kahane is a rabbi of Orthodox persuasion who is at this present time not being provided kosher food by the Government. I think my papers make that clear.

THE COURT: I don't think that is contested. Is that contested?

MR. PATTISON: No.

THE COURT: All right. That will be assumed to be the fact.

MR. SLOTNICK: I would ask your Honor then to

accept my memoranda as submitted to the Court as part of this hearing and incorporate the facts referred to therein, especially since I don't believe they are being contested.

THE COURT: I think we have had sufficient at this hearing, in view of the judicial notice you have required me to take.

MR. SLOTNICK: Your Honor, at this time I respectfully rest and request that the Court issue an order requesting the Bureau of Prisons to provide Rabbi Meir Kahane with sufficient kosher food so as to satisfy his dietary requirements and his religious requirements.

THE COURT: Does the Government have anything to offer?

MR. PATTISON: No evidence, your Honor, but I would like to be heard on the question.

THE COURT: I will be very pleased to hear you.

MR. PATTISON: Your Honor, I believe it's clear --

THE COURT: You don't have to rise unless you want to.

MR. PATTISON: I will, your Honor.

THE COURT: Why don't you go to the lectern then, if you will?

MR. PATTISON: I believe it is clear from the actual memo of law submitted last evening, when I saw it first, that the movant has not pursued the issue and finds and offers no authority for the proposition that a court may order terms, conditions, etc. of a sentence.

I believe that that issue is relatively settled. I believe that the motion papers --

THE COURT: I am not sure I understood that last statement.

MR. PATTISON: Your Honor, I believe that when we last met, the Court instructed the movant to submit a brief as to the power of a court to impose terms upon the Bureau of Prisons in conduct of a sentence; that is, the power of a judge to order the Bureau of Prisons to place a prisoner in a particular situs, etc.

The Court also mentioned at that time that a secondary corollary provision that might be helpful to the Court would be whether the Court may treat the motion not as a motion to order the Court to do any particular thing but as a Rule 35.

It is clear from the memo of law submitted that the secondary issue was the only one briefed and the only one which there is any question about at

this time.

THE COURT: I don't understand that the defendant-movant is conceding that the Court lacks power to condition its sentence. You are correct that there is a paucity of authority in the brief, but there is very little authority on the question.

MR. PATTISON: Your Honor, that is what I want to look at now. That is the issue, the question to determine, whether or not the Court may look at this motion as a 35 motion.

THE COURT: I take it the defendant moving party is not conceding that this Court lacks power to condition a sentence?

MR. SLOTNICK: As a matter of fact,the basic thrust of our proof, your Honor, is attempting to give the Court at least ten reasons why he does have jurisdiction over the defendant at this point.

THE COURT: Your contention is that I have power?

MR. SLOTNICK: Absolutely.

THE COURT: All right.

MR. PATTISON: Your Honor, I think that our letter to the Court answers that adequately and I will not use the time now on that.

Relative to the 35 issue. I believe the

authority, and I must state that we have been unable to find a case right on point. However, I believe the statutory authority makes it clear that the Court may not treat the instant motion as a Rule 35 motion. I believe the statutory authority in the rule, particularly the last sentence of the rule, was the authority under which the Court did in fact lower the sentence which the Court had imposed, that is one of five years to one of one year.

The 1966 amendment to Rule 35 authorized just that particular type of treatment.

I believe that it is clear that when that sentence speaks of other law authorizing the Court to impose sentence, it means Title 18 Section 3653, as Wright's textbook makes clear. That is, that upon a finding of revocation, or upon an order of revocation, the Court need not impose the same prison sentence it had imposed at the time of the first sentence, but may indeed lower it. That has been done.

In other words, insofar as this is presently a Rule 35 motion, the Court should deem it to have been made at that stage on the 21st, February 21st, after the Court announced its actual finding, but before the imposition of a sentence.

I think that this meaning of the last sentence of the present form is clear, because if it were not, if it did indeed authorize another 120 days over and above the original 120 days limitation period imposed clearly by law, then it would have said so, and I believe that in logic and in common sense, a prisoner or a sentenced prisoner-defendant cannot avail himself or should not be allowed to avail himself of another second 120-day motion period by the simple expedient of possibly going out purposely and violating probation, which would be the effect.

Certainly, the statutory history, such as it does exist, and that too is nil here, makes clear that what the framers had in mind, or what the legislators had in mind was not to mandate that the Court, if it finds the prisoner violated probation, must sentence him to the same prison term which it had originally put into effect, but may immediately lower it, as was actually done.

I believe that the one case cited -- the first case cited in the memo of law submitted last evening, the Fitzgerald case, makes that clear. That case holds merely that the Court may indeed lower the sentence upon a finding that the man did indeed violate terms of probation. But nowhere can

it be said that there is any authority that a man may then avail himself of a second 120-day period and move anew, which is a right which any other prisoner does not have, prisoner who has in fact lived up to the terms.

He has lost that right whereas one who has not has the extra 120 days, and I believe that flies in the face of logic and common sense.

THE COURT: I think there is a lot to be said for that position, in view of the language. Your position would be, for example, if within 120 days a new sentence was imposed reducing that, that from the point of that new sentence you could not measure your another 120 days -- the original 120 days would be from the original sentence?

MR. PATTISON: Yes.

(continued next page)

THE COURT: And that the last sentence merely permits a reduction on that one occasion.

MR. PATTISON: Yes.

THE COURT: But that's an independent reduction from the original sentence, and the 120-day provision doesn't apply.

MR. PATTISON: Yes.

THE COURT: That certainly is arguable from the language.

MR. PATTISON: Your Honor, may I further say that the Court may, of course, recommend policies, or may, of course, recommend terms, may, indeed, recommend situs, prisoners' sentences. The Court may and should do that.

THE COURT: Well, I suppose --

MR. PATTISON: -- and as such --

THE COURT: I am sorry.

MR. PATTISON: And as such, the Court may indeed hold a hearing be taken, evidence, to seek whatever aid the Court feels might help in making this recommendation to the other branch of Government, the Executive Branch. But there is simply no authority for a binding Order in a procedural setting as this. That is, as an adjunct to an actual sentence.

Court's may, and of course should, litigate and rule upon prison terms, sentences -- not sentences -- but prison meals, conditions, et cetera. Our system

makes available vehicles for such Court Orders. And as the papers submitted made clear, there is a remedy here.

THE COURT: Your position, I take it, is that he would have to go to Allenwood, or wherever he was sent, and then, if he weren't supplied with kosher meals, he would have to make an application in the District Court which has jurisdiction over that correctional institution.

MR. PATTISON: As every other prisoner must.

THE COURT: Let me pose this question to you, however.

Suppose we have a motion under 2255(a), on the grounds that the original sentence was unconstitutional because the sentence -- to sentence a person to an institution where the Court knows he will be denied kosher foods, under circumstances where he will have to approach death before he can partake of any food, this constitutes cruel and unusual punishment under the Constitution, and also constitutes a denial of his religious rights under the Constitution.

Could not the Court at any time consider the sentence under 2255?

MR. PATTISON: Your Honor, we have gone from the first Order to a Rule 35, and now we go to another Section.

Possibly the Court might.

THE COURT: Have you considered --

MR. PATTISON: Again --

THE COURT: Excuse me. Have you considered this matter and briefed it?

MR. PATTISON: No, I have not, your Honor. And may I say that the reason we have not is that my understanding of that Section is that a motion under that Section tantamounts to a writ of habeas corpus procedure, and, indeed, takes the place of it under certain terms. And I believe there is no provision in that Section for a motion in advance of the wrong alleged.

THE COURT: No.

MR. PATTISON: Again, the --

THE COURT: 2255, Title 28 of the United States Code, first makes this proper venue. There's no doubt that this is the proper place to bring such a motion.

MR. PATTISON: Yes.

THE COURT: He doesn't have to wait until he gets to another institution.

MR. PATTISON: No.

THE COURT: It says that a prisoner in custody under sentence of a Court -- This prisoner is in custody under sentence of a Court --

MR. PATTISON: Yes.

THE COURT: -- claiming the right to be released

upon the grounds that the sentence was imposed in violation of the Constitution, may move the Court which imposed the sentence to vacate, set aside or correct the sentence. It also provides that a prompt hearing shall be had. It also provides that if there has been a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the Court shall vacate and set the judgment aside.

MR. PATTISON: Yes, your Honor.

THE COURT: And discharge the prisoner or resentence him. Or correct the sentence, as may appear appropriate.

MR. PATTISON: Yes, your Honor. And I was --.

THE COURT: And it is true that the defendant here has proceeded by motion within the criminal action whereas under 225 of Title 28, he would have to file what amounts to a new action on the civil side of the Court.

Now, I suggest, therefore, that the defendant may wish to consider going down to the Clerk's Office and filing papers pursuant to 2255, and asking that the case be considered -- the cases be considered as a related case.

MR. PATTISON: Your Honor, may I cite --

THE COURT: -- At which time, I am sure the Government will not object to the Court considering all of the evidence and materials thus far considered at this hearing as part of that separate action and motion.

MR. PATTISON: Of course not.

May I say that the preferatory remarks of the Court at the outset was that it would consider it.

THE COURT: Well --

MR. PATTISON: With a view toward its recommendatory powers. But we will not stand upon ceremony.

THE COURT: All right. What is the intention of the defendant with respect to this problem.

MR. PATTISON: May I also --

THE COURT: Let's get this straightened out so we can get a stipulation.

MR. SLOTNICK: Logistically speaking, it would then be the intention of the defendant to stipulate, and as I mentioned in my memorandum, the Fourth Circuit isn't really concerned -- and I don't think in this Circuit -- about the niceties of the papers. If your Honor feels among one of the reasons why he may exercise jurisdiction is under 2255(a), we would request the stipulation at this point that our papers be so amended to reflect that this proceeding is being brought under 2255.

THE COURT: Well, I think you are going to have to file separate papers, because you may have a problem on appeal. I suggest you go down and file a separate motion, if that is your intention.

MR. SLOTNICK: I certainly will.

Mark the papers as related. And with the consent of the Government, all papers in the pending motion in the criminal action will be deemed to be part of that new civil action.

MR. PATTISON: Your Honor, may I say, I would, of course, like some time to look into the brand new matter raised by the Court.

THE COURT: It's nothing new. I am sure it was in your mind all along. I am just making a public record.

MR. PATTISON: It was. But, your Honor, also that which was in my mind was that the Section which the Court read, quote, "If there has been violations --" past tense. There has been no violation.

THE COURT: Well --

MR. SLOTNICK: Your Honor, may I be heard on that?

THE COURT: Well, you will brief that point. How long do you want to brief it?

MR.PATTISON: Twenty-four hours.

THE COURT: All right. Have it briefed by tomorrow

night.

MR. PATTISON: Yes, your Honor.

THE COURT: You can have a brief in on this, Mr. Slotnick. I'm sure you have considered this point thoroughly, too, and it's just a matter of reducing it to writing very promptly.

MR. SLOTNICK: We have indicated in our memorandum of law that was supplied to your Honor last evening that the defendant is presently agrieved. He is not receiving kosher foods by the Bureau of Prisons.

THE COURT: I understand. All right.

MR. PATTISON: He's not being kept from kosher food, which is the real -- which is the real gravamen of any action --

THE COURT: Let me get the position of the Government clear, if I may.

MR. PATTISON: Yes.

THE COURT: Does the Government flatly refuse to supply this defendant with kosher food in any institution?

MR. PATTISON: No, it does not.

THE COURT: Will it supply him with kosher food?

MR. PATTISON: I cannot say, your Honor. It does supply prisoners with food, kosher foods at certain times of -- certain times of the year, holidays. It

does not as a regular diet.

I am not authorized to change that long-held executive policy.

THE COURT: Then, as I take it, the Government will not supply this defendant with kosher food except on holidays as indicated by Warden Galligan.

MR. PATTISON: And except that -- And except insofar as my understanding of the present state of the policy is that they make available kosher foods -- foods which are kosher. That is, vegetables and fruits, et cetera, so that --

THE COURT: Well, you haven't submitted any proof on that. I'm going to take the testimony --

MR. PATTISON: I believe that the Court Exhibit marked earlier, the Southern District hearings were all made part of the record. There is proof in there, your Honor.

THE COURT: There is proof only that those defendants were permitted to go into the kitchen and to get cheese at times.

MR. PATTISON: Yes.

THE COURT: Hard-boiled eggs at times, and to use the facilities to supplement their food.

MR. PATTISON: But according to the general dietary requirement of the Correctional Institutions,

a full kosher diet is not supplied.

MR. PATTISON: No, that is correct. The Government doesn't say that it is --

THE COURT: And the person in charge -

Let me have that Exhibit.

(continuing) -- who testified for the Government on this issue, James G. Wahl, W-a-h-l, indicated on page 12 of the transcript that a very careful check is taken by the Correction Authorities to insure that there is proper nutritional value; a registered dietician, who makes a fine-line analysis. There is a daily nutritional accounting system. There is a review of the menu for acceptability, palatability, color texture, correct combination and the like.

And that, as I understand his testimony, the kind of diet that is available at West Street under the conditions you described of the defendant being in the kitchen to supplement their diet would not be acceptable. So I'm going to have to assume in the absence of any other evidence that a minimally accepted diet will not be made available to this defendant if he is sent to an institution other than the one he is at now, under the conditions where he is now permitted to eat food outside of the Center, and at his own expense.

I think that's the fair assessment, is it not?

MR. PATTISON: Yes, your Honor. But I just want

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to make sure that the Court would take into account the other evidence submitted, the Southern District hearing as a whole.

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(continued on next page.)

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THE COURT: I have it. I have read that transcript carefully.

MR. PATTISON: And it is deemed part of the evidence here.

THE COURT: Marked at my request, yes.

MR. PATTISON: Your Honor, the Government would at this time request the Court to vacate the previously imposed orders.

THE COURT: I will take that under consideration and reserve decision on that request subject to receiving your brief and any supplemental that the defendant wishes to submit.

MR. PATTISON: Your Honor, on that issue, we have put in a brief submitting -- briefing in the form of a letter.

THE COURT: Yes, I know. Well, I understand the position. I find that it's a difficult problem. I will consider the matter.

MR. PATTISON: The only other brief that we plan to put in now would be on the plan motion -- the 2255 motion.

THE COURT: Yes.

MR. PATTISON: The basic issue of the Court's powers which it has, we feel, does not need any further briefing.

THE COURT: No. I'm grateful for your assistance and that of defense counsel. I will reserve the decision.

MR. PATTISON: Very well, your Honor.

MR. SLOTNICK: Your Honor, may we approach for a moment?

THE COURT: Do you mean you want a side-bar conference?

MR. SLOTNICK: Yes.

THE COURT: Yes.

(The following took place at the side bar.)

MR. SLOTNICK: Your Honor, last evening I had occasion to speak to the former Attorney General of the United States, Ramsey Clark, who had indicated that your Honor reserves decision he would be making an application to -- as an amicus. And in view of your Honor's tight briefing schedule, would he be denied that opportunity or --

THE COURT: Well, when he is going to submit his motion? I can't keep the case going indefinitely. I think the Government is entitled to a fairly prompt decision.

MR. SLOTNICK: He will in all probability call your Honor, I would presume, in the next twenty-four hours.

THE COURT: When?

MR. SLOTNICK: Within the next twenty-four hours.

THE COURT: When is he going to submit a brief?

MR. SLOTNICK: I presume he will submit it through the time period that your Honor so mandates.

THE COURT: If he can get it in within the next few days -- I would like to work on the case over the weekend.

MR. SLOTNICK: And I would also respectfully request, your Honor, that my client, who has been in a minimum security institution, who will be leaving with the Marshal, not be let out of the courthouse as he was brought in, in leg irons and chains. I don't think that is fair.

THE COURT: It is not necessary. What is the point? He walks around the City to get his food.

MR. PATTISON: I agree. I believe that it's for the Marshals. They have their own rules whenever they take him. I, of course, have no objection to it whatsoever. But I agree that I doubt --

THE COURT: Tell them not to put the leg irons on.

All right, anything else?

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MR. SLOTNICK: No.

THE COURT: All right.

(End of side bar.)

THE COURT: Thank you very much. The hearing is closed.

* * * * * *

A 151
WEINSTEIN, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75C 624

MEIR KAHANE,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

APPLICATION PURSUANT TO 28 U.S.C.A. 2255

S I R S :

PLEASE TAKE NOTICE, that upon the annexed petition of MEIR KAHANE, by his attorney BARRY IVAN SLOTNICK, and upon all of the proceedings had herein, the undersigned will move this Court to vacate, set aside of correct the sentence imposed upon the above named petitioner, MEIR KAHANE, pursuant to Title 28 U.S.C.A. Section 2255 and for such other and further relief as this Court may find just and proper.

Dated: New York, New York
April 25, 1975

Yours, etc.

BARRY IVAN SLOTNICK
Attorney for Petitioner
233 Broadway
New York, New York
(212)-233-5390

TO: DAVID TRAGER, ESQ.
U.S. Attorney
Eastern District of N.Y.
United States Courthouse
Brooklyn, New York

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A 152

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEIR KAHANE,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION

BARRY IVAN SLOTNICK, on and behalf of the petitioner MEIR KAHANE respectfully shows to the Court:

1. That the defendant MEIR KAHANE is presently serving a sentence of one (1) year imprisonment imposed by this Court on February 21, 1975.

2. That on March 17, 1975 this Court granted an application and issued an order allowing the defendant his religious rights pursuant to his request for kosher food, etc. (see Commitment Order and Application of March 17, 1975).

3. Pursuant to the order of the Court, petitioner's attorney contacted officials of the United States Bureau of Prisons and was informed that the Bureau of Prisons would not provide the means by which the order of the Court could be carried out. To date the Bureau of Prisons has refused to provide the defendant with kosher food (the record is replete with their refusals - and the Court is respectfully referred to a hearing held herein on April 24, 1975).

4. Petitioner's counsel requested that the defendant's incarceration be maintained at a community treatment center in order that he may be allowed to provide himself with kosher meals and attend religious services - due to the refusal of the Bureau of Prisons to so honor the Court's commitment.

5. That on April 4, 1975 this Court continued the defendant's incarceration at a community treatment center and continued the order allowing him out to eat meals and attend religious services.

6. Thereafter, on April 18, 1975, a proceeding was commenced in which issues of jurisdiction relating to the proposed hearing were taken up.

7. That on April 24, 1975 a hearing was held before this Court in which witnesses testified with regard to the necessity of the government to provide the defendant with kosher foods during any period of incarceration.

8. That during the same hearing the testimony indicated that it was a simple process to provide an inmate with kosher food and that the aforementioned procedure had occurred in the past but was not taking place with regard to the inmate MEIR KAHANE.

9. The inmate indicated to this Court that he is presently an aggrieved individual and that he is not receiving kosher foods according to the spirit and dictates of this Court's sentence, commitment and order.

10. At present the inmate is incarcerated at the community treatment center maintained by the United States Bureau of Prisons located at 38 West 31st Street and is not being provided kosher meals by the government.

11. The inmate contends that the effect of the sentence as levied upon him on February 21, 1975 and as so governed by the various applications and commitments pursuant to 71 Cr. 479 (United States of America v. Kahane) is to cause a deprivation of his 1st and 8th Amendment rights under the Federal Constitution.

12. It is the further contention of the petitioner that he cannot be incarcerated without the right to receive kosher food as said incarceration is not only a violation of his 1st Amendment right but also constitutes cruel and unusual punishment under the Constitution of the United States.

13. The defendant further wishes to repeat and reaffirm and incorporate by reference all of the prior papers and proceedings had herein commencing with the original hearing regarding his probation violation (February 21, 1975). Furthermore, the various applications and memoranda submitted herein under indictment 71 Cr. 479 (United States of America v. Meir Kahane) are also repeated and reaffirmed for the purpose of this proceeding herein.

14. Furthermore, defendant requests that his Notice of Motion, motion and affidavit submitted to this Court and dated April 11, 1975 be made part of this application together with the supplemental memorandum of law submitted thereafter together with the memorandum of law submitted on April 23, 1975 to this Court.

15. Furthermore, the defendant requests that the hearing held on April 24, 1975 be considered as part of this record in order for the Court to be able to fully decide the issue herein.

16. That the petitioner repeats and reaffirms all of the exhibits, papers and proceedings heretofore had herein and bearing indictment number 71 Cr. 479 as if fully set forth herein.

17. That the sentence hereunder is therefore illegal and void and imposed in violation of the Constitution of the United States in that the petitioner is not receiving kosher food all in violation of his 1st and 8th Amendment rights pursuant to the Constitution of the United States.

18. It is the contention of the petitioner that the sentence imposed was in violation of the Constitution or laws of the United States and that the Court was without jurisdiction to impose such sentence and that the aforementioned sentence (under which he is presently incarcerated) is subject to collateral attack due to its resultant effect of unconstitutionality and therefore makes this application to the Court to vacate, set aside or correct the sentence.

19. The Court can readily find that there has been a denial and infringement of the constitutional rights of the prisoner so as to render the judgment vulnerable to collateral attack.

20. Therefore, pursuant to Title 28, United States Code, Section 2255 the Court must vacate and set the judgment aside and discharge the prisoner or resentence him or correct the sentence as may appear appropriate to the Court.

21. This application is made due to the present illegality of the defendant's detention. The sentence of this Court and its resulting effect presently violates his 1st and 8th Amendment rights of the United States Constitution in that he is not receiving kosher food pursuant to the dictates of his religion. The sentence levied upon the defendant therefore is obviously unduly severe and the terms of sentence as is being carried out has caused the defendant to be constitutionally deprived.

22. The defendant was originally tried for a violation of probation by this Court for acts which occurred in Israel to which he was either found guilty or pled guilty. The judgment of the Israeli Courts was that he was receiving a suspended sentence.

23. The defendant has spent time in Israel incarcerated as a result of the initiation of the aforementioned cases as referred to in the original revocation of probation hearing held on the 21st day of February 1975 before this Court.

24. This Court has received communications from the defendant, his family and literally hundreds of members of the community requesting that the Court reconsider, modify or terminate the sentence of the defendant.

25. It is respectfully requested that this Court resolve the issues and controversy concerning the religious rights and freedom of an inmate in order to properly preserve their 1st Amendment right and also to avoid excesses that have occurred in prisons regarding same.*

WHEREFORE, petitioner prays that this Court entertain his application pursuant to 28 U.S.C. 2255 and issue an order remedying the grievance of the inmate pursuant to 28 U.S.C. 2255 and that petitioner receive such other and further relief as may be deemed just and proper.

Dated: New York, New York
April 24, 1975

BARRY IVAN SLOTNICK

*Counsel did not present to this Court testimony at the hearing held herein in view of the limitation to kosher food but Orthodox Jews have been forcibly shaven during holidays in which they are not allowed to, forced to break the Sabbath and transported on the Sabbath. Note that during the present period of time the inmate MEIR KAHANE cannot shave for religious reasons and if he were incarcerated at other than a community treatment center he would either be forced to shave or be forcibly shaven - all in violation of his Constitutional rights. Under the theory of the government he could not present a claim until the violation had occurred - to wit, being forcibly shaven. There are also coming holidays including Rosh Hashana and Yom Kippur - which mandates a day of fast together with other holidays occurring during the summer which mandate fasting. The prisoner has already been caused to spend the high holidays of Passover away from his immediate family - but with others therefore allowing his observance all by Court order and consent of the government.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BARRY IVAN SLOTNICK, for and on behalf of the petitioner inmate, MEIR KAHANE, first being duly sworn states that the allegations of the foregoing application for habeas corpus are true to the best of his knowledge and belief.

BARRY IVAN SLOTNICK

Subscribed and sworn to
before me this 24th day of
April, 1975.

NOTARY PUBLIC - STATE OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA, : MEMORANDUM AND ORDER

Plaintiff, :

-against- : 71-CR-479

MEIR KAHANE, :

Defendant.

- - - - - - - - - - - - - - - - -X
- - - - - - - - - - - - - - - - -X

MEIR KAHANE, :

Plaintiff, :

-against- : 75-C-624

UNITED STATES OF AMERICA, :

Defendant. :

- - - - - - - - - - - - - - - - -X

A P P E A R A N C E S:

Honorable David G. Trager
United States Attorney, Eastern District of N. Y.
225 Cadman Plaza East
Brooklyn, New York 11201
Thomas R. Pattison, Esq.
Edward R. Korman, Esq.
Of Counsel

Barry Ivan Slotnick, Esq.
233 Broadway
New York, New York 10007
Attorney for Meir Kahane

WEINSTEIN, D.J.

The defendant, an ordained orthodox rabbi sentenced to imprisonment by this court, seeks food meeting orthodox Jewish dietary requirements (kosher food). The government contends that this court has no power to consider his claim. For the reasons stated below the court holds that it has the power and obligation to require the government to permit this defendant to obtain such food while he is incarcerated.

I. HISTORY OF LITIGATION; INTRODUCTION

In 1971 the defendant pleaded guilty to attempting to make a bomb. There was no proof that his activities had directly led to any physical damage but there was reason to believe that his rhetoric and encouragement had led others to engage in violence and that these activities by others may have led to death and to destruction of property.

In view of the factual ambiguity, the defendant's good background as a teacher, father and husband, his lack of any substantial criminal record, the fact that he appeared to be motivated by consideration of the welfare of others rather than self, and the recommendations of authorities that probation be utilized in such circumstances, the court sentenced the defendant to five years probation. A.B.A. Project on Standards for Criminal Justice, Standards Relating to Sentencing Procedures, Standard 2.3(c), Commentary at pp. 72-73 (Approved Draft 1968); A.L.I. Model Penal Code § 7.0

As one of the conditions of acceptance of a guilty plea and probation, the defendant's associates were compelled to turn over to the police stores of secreted explosives.

At the time of sentencing the defendant was warned not to become involved with guns or explosives. He was told: "In this country, at this time, it is not permissible to substitute the bomb for the book as the symbol of Jewish manhood." Shortly thereafter he was found in the company of people with rifles who were urging others to obtain arms. He was then informed in more detail that he was to have nothing to do, directly or indirectly, with weapons. It was made explicit and clear that this prohibition applied throughout the world and, more particularly, in the State of Israel. The defendant then left with his family to settle in Israel.

Following the murder of members of the Israeli Olympic Team in Germany and attacks on Jewish settlements by Palestinian guerillas, the defendant again engaged in prohibited activities. The evidence shows that he attempted to smuggle weapons out of Israel into this country and that he engaged in Israel in an attempt to induce others to bomb foreign embassies here and elsewhere. Just as his activities had been aborted in this country by vigilant police work at the national and local levels, so the Israel police dis-

FPI MI—4-25-74 11CM 2075

covered his plans in time. He was held in prison in Israel, convicted and released.

Thereupon, he returned to this country where he was prosecuted for violation of probation. After a full hearing he admitted his guilt. Extensive pleas for mercy were made on the ground that the defendant was motivated by a desire to help others in the Soviet Union and elsewhere. This court rejected those pleas. It noted that, "were it to fail to punish. . ., the probation system could not effectively continue. . . .[N]o system of justice in a democracy can exist if violence is not condemned, no matter who the victim, no matter what the motive and no matter who the actor."

Since his term of probation had approximately one year to run, defendant was sentenced to one year in prison. 18 U.S.C. § 3653. With no objection by the government, the court ordered:

> "He is to be placed in an institution, and in a setting so that he can obtain. . .kosher foods and [comply with] other religious requirements that he may reasonably have."

Before service of sentence begins, it is the normal practice of the court, whenever possible, to allow a defendant to arrange his affairs or to celebrate imminent holidays, such as Christmas, with his family. In this case,

since the defendant's family resided in Israel, it was not possible for him to be with it during Passover, which was about to begin. Accordingly, with the concurrence of the government, he was remanded to the Federal Community Treatment Center in New York City during Passover, with instructions that he be permitted to buy his own food in local establishments and to participate in required religious services. As the Passover period came to a close and the defendant was about to be transferred to a prison, the defendant informed the court that the government planned to deny him kosher food. The government conceded that, under its long-standing practice, this was its intention.

Pending decision of defendant's motion that such food be provided, the defendant was ordered kept at the Community Treatment Center. He was to be permitted to purchase kosher food at his own expense in a local restaurant and to engage in required communal prayers in a nearby synagogue. At other times he was to be kept at the Center under normal conditions of incarceration as fixed by the correction authorities.

The government contests the court's jurisdiction to consider whether the defendant is entitled to kosher food. It also argues that the court should not decide the issue because it would be burdensome to meet the religious

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dietary needs of its diverse prison population.

A person does not lose his basic humanity and constitutional rights because he has been convicted or is serving a term in prison. In this respect we differ fundamentally from some governments which consider its citizens' rights forfeited upon incarceration and engage in abuses of prisoners that amount to a form of slavery. Our courts have made it clear that, to the extent consonant with effective administration of correctional institutions, the First Amendment rights of prisoners cannot be ignored:

> "[A] policy of judicial restraint [concerning prison administration] cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."

Procunier v. Martinez, 416 U.S. 396, 405-406, 94 S. Ct. 1800, 1807-08, 40 L. Ed. 2d 224 (1974). See also Cruz v. Beto, 405 U.S. 319, 321, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263 (1972)("Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons', including prisoners."); Wilson v. Beame, 380 F. Supp. 1232, 1242 (E.D.N.Y. 1974)("the Constitution requires the broadest tolerance of religiously based activity and requires public officials to take care to avoid inhibiting any thoughts and

deeds reasonably characterized as religious.").

II. TESTIMONY AND AUTHORITIES ON IMPORTANCE OF KOSHER FOOD

A. Testimony

At the hearing, the main witness was Rabbi Moishe D. Tendler, an ordained Orthodox Rabbi, a senior member of the State Advisory Board on Kashruth to the New York State Department of Agriculture and Markets, a member of the Advisory Board on Kashruth of the Rabbinic Council of America, and a Professor teaching both Talmudic law and biology at Yeshiva University. Rabbi Tendler testified that dietary laws (kashruth) are central to the religious observances of orthodox Judaism and that an orthodox Jew must be "in extremis" before violating these laws:

> "If all [an orthodox Jew] had was non-kosher food to eat, he would have to wait until his physiological state--his vital signs would be so determined by competent medical authorities that he is in danger of dying--then and only then could he partake of food [according to Biblical and Rabbinic law].
>
> . . . .
>
> "Up until forfeiture of life, man must forfeit everything he has, company of his wife and children, his entire wealth, to enter into the realm of the most poverty-stricken rather than transgress the Kashruth laws.
>
> "He is to allow himself to be subjected to torture, to physical torture, to mutilation rather than consume [non-kosher] food.

> "I hope that impresses the Court with the fact that we are not dealing with a frivolous notion. It is not a question of a special dietary requirement of white wine with fish or red wine with beef. We are talking about a critical need of the Jew to relate with his God in a series of instructions that have been our mark of distinction from the days that we left Egypt so many thousands of years ago.
>
> . . . .
>
> "At no time is he exempted, from the day he is born. . .until the day he dies. . .he is governed by Jewish law."

His testimony was confirmed by three other rabbis at the hearing and by a letter, admitted without objection, from Rabbi Moshe Feinstein, a renowned expert on Talmudic law. This evidence was not contested by the government.

A number of rabbis testified that they had personal knowledge of the defendant's religious practices. They knew him to be a meticulous observer of all the tenets of Biblical and Rabbinic law, including kashruth. The government did not dispute this testimony.

Rabbi Henry Siegman, Vice-President of the Synagogue Council of America, testified that his organization, which has assisted the Federal Bureau of Prisons for the past fifteen years in providing Jewish chaplains, regularly requested that the Bureau provide kosher food to Jewish

prisoners, but had been unsuccessful. He, and other witnesses testified, without contradiction, that kosher food could be provided, using modern technology, with no inconvenience to a large institution serving meals to a predominantly non-observant population. They gave detailed descriptions of how this could be accomplished using the regular kitchen equipment of the institution with no appreciable administrative difficulties.

Louis Gengler, Warden of the Federal Detention Headquarters at West Street, testified that one prisoner in his institution had received frozen kosher meals as an "experiment" through arrangements made and paid for by the government; no difficulty was encountered. He agreed that these dinners could be stored and prepared with minimal inconvenience. He further stated that another defendant, while incarcerated at West Street, had been assigned to the prison's Food Service unit and provided, out of regular prison supplies and through his commissary account, with supplemental foods meeting kosher requirements, including hard-boiled eggs, some cheeses, tinned-fish and fruits. The Warden also testified that the prison provides Jewish inmates with a kosher meal on Passover and other Jewish holidays. He admitted that a recent attempt by several rabbis to provide

the prison with frozen kosher dinners for observant incarcerated Jews, without expense to the government, was refused in accordance with a policy not to provide kosher food regularly or to accept it from others.

With the consent of counsel, the court took judicial notice of the papers filed and testimony given in a case that has been pending in the Southern District of New York, United States v. Huss, -- F. Supp. --, Nos. 73-CR-24, 25 (S.D.N.Y. May 5, 1975). Although the factual background is distinguishable, that case also presents the issue of whether inmates are entitled to food that meets orthodox Jewish requirements and is comparable in nutritional content to the menu served to other federal prisoners. The government, in Huss, stated the practice of the Federal Bureau of Prisons in the following terms:

> "[W]hile in exceptional cases Kosher food has been made available, it is the policy of the Bureau that such food is not to be made available to the inmates on a routine basis. It has been the Bureau's decision that administrative, financial, disciplinary, and security problems which would be created by the offering of such food so far outweigh the incidental burdens upon the practice of the inmates' various religions as to preclude attempting to accomodate the dietary needs of the diverse groups within the prison population."

It is the government's position that this posture is consistent with the official Bureau of Prisons policy requiring its personnel

> "to extend to committed offenders the greatest amount of freedom of, and opportunity for pursuing, individual religious beliefs and practices as is consonant with the Bureau of Prisons mission -- the correction of the committed offender. This must be accomplished within the context of the requirement of maintaining security, safety, and orderly conditions in the institutions."

Bureau of Prisons Policy Statement 7300.43A (July 7, 1970).

Testimony in the Huss case by prison officials indicated that the average cost of kosher meals would be somewhat higher than that for an average prison meal. An attorney, however, estimated that only six to twelve inmates in the entire federal prison system would seek kosher food if it were available; this contention was not challenged.

It is possible to summarize this testimony as follows: (1) dietary laws are of critical theological importance to orthodox Judaism; (2) incarceration does not relieve an orthodox Jew of the obligation to obey these religious requirements; (3) defendant observes these practices strictly and would have to be in danger of death through fasting before he could partake of a non-kosher diet; (4) the Bureau of Prisons has refused to, and will refuse to, provide the defendant with food consistent with his orthodox Jewish religious beliefs; and (5) providing foods meeting orthodox Jewish requirements does not create significant administrative difficulties in prisons. This summary

constitutes this court's findings of fact based upon evidence adduced at the hearing. Fed. R. Civ. P., Rule 52; Fed. R. Crim. P., Rule ;

B. Judicially Noticed Literature

Particularly with regard to the importance of dietary requirements, judicially noticed literature supports these findings. See Fed. R. Ev., Rule 201.

The concept of "kashruth" (dietary observances) does not involve cleanliness or alimentary needs in any hygienic or nutritional sense. Rather, what is involved is the issue of godliness. Each person observing kashruth is treated as if he were in a direct relationship with God, observing what in other religions might be considered a priestly function at the table in the sequence of preparation and service of food and of prayers. With the final destruction of the Temple and the beginning of the Talmudic period in Babylonia and Palestine, a set of strict regulations developed surrounding the consumption of food analogous to those governing the Temple priests, but to be observed by each Jew in his daily life. See J. Neusner, Invitation to the Talmud 14-20 (1973). In a sense, therefore, each meal partaken by a person strictly observing the rule of kashruth is the equivalent of Christianity's sacramental mass, where

the implements, wine, and wafer must be prepared with careful consideration for "cleanliness" in a theological sense.

A theological concept central to Judaism, recognized by Jewish and non-Jewish scholars alike, is that of a "covenant" between God and man. The covenantal theme--that God loves his people and will favor them in generations to come and lead them to a promised land, and in return men shall walk in God's way--is repeated again and again in the Genesis stories of Noah, Abraham, Isaac, Jacob, and Joseph. See N. Sarna, Understanding Genesis 120-133 (1967). The covenant theme is the essence of stories of the exodus and of Moses, and becomes the crucible of the messages of the Prophets and essential to an understanding of the relation between God and man. See, e.g., G. von Rad, Old Testament Theology 129-135 (D. Stalker trans. 1962). Individual responsibility is not submerged in the covenant with a people. As Sarna notes:

> "this biblical 'doctrine of merit,'. . .has profound consequences for man, for it implies that the individual is of supreme importance and that from his actions may flow beneficial consequences for all society."

N. Sarna, supra, at 151.

The way in which man's covenantal obligations to God are understood in the Old Testament and in the Talmud and elsewhere is through the concept of law--there are duties men must fulfill to be faithful to God. Particularized laws evolved in a succession of codifying patterns. See J. Smith, The Origin and History of Hebrew Law, esp. at 52-53, 127-130 (1960); R. Pfeiffer, The Books of the Old Testament 70-95 (1965). Some scholars have grouped the content of Exodus, chapters 20:23-23:33 34:17-26, into a "Covenant Code", and Deuteronomy, chapters 12-26, into a "Deuteronomic Code". Smith, supra, at 15-69; Pfeiffer, supra, at 70-77, 78-83. Similarly, Leviticus, chapters 17-26; Exodus, chapters 31:13-15; and Numbers, chapters 10:10, 15:38-40, have been grouped by some scholars into a "Holiness Code." Smith, supra, at 70-92; Pfeiffer, supra, at 83-86. It is particularly in this last grouping that many of the biblical sources for kashruth are found. See, e.g., Leviticus, chapters 11, 17, 22:18-30; Deuteronomy, chapters 12:16; 2:23-25, 14; Exodus, chapters 23:19, 34:26.

Preclusion of certain foods dates from the symbolic "forbidden fruit" in Genesis, chapter 2:16-17, but, as suggested above, kashruth acquires its central meaning from the covenant relationship. The covenant, as understood in the Bible, implies a relationship between parties of different orders of being (G. von Rad, Old Testament Theology

129 (D. Stalker trans. 1962)), whereby men obtain harmony with the deity through strict observation of the law, of which the "Holiness Code" is an important aspect. See J. Smith, The Origin and History of Hebrew Law 90-92 (1960 ed.). Thus kashruth is deeply symbolic--a symbol made real through the ritual of daily observance--of the basic relationship between God and man.

Compliance with the discipline of kashruth is one of the important ways by which the faithful are reminded of the presence of the significant in the commonplace. See, e.g., M. Kadushin, The Rabbinic Mind 167-170 (3d ed. 1972). And obedience to the law itself is a source, says rabbinic tradition, of holiness. S. Schechter, Aspects of Rabbinic Theology 168, 207-208 (Schocken Books ed. 1972). Compliance with kashruth, writes Schechter, has

> "to be considered as so many lessons in discipline, which if only as an education in obedience, result in establishing that communion between man and God which is the crowning reward of holiness." Id. at 208.

Kashruth, while deeply rooted in Biblical literature, forms a major part of the rabbinical interpretations in both the Babylonian and Palestinian Talmuds. See, e.g., The Babylonian Talmud, Seder Kodashin, Tractate Hullin, xi (Soncino edition, I. Epstein ed., E. Casdan trans. 1948)("it

is predominantly through the observance of the dietary laws and the abstention from what is unclean that Israel can maintain itself as a holy people."). See also, e.g., The Babylonian Talmud, Seder Kodashin, Tractate Kerithoth 1, 17-38 (Soncino edition, I. Epstein ed., I. Porusch, trans. 1948)(offenses for which one is to be punished by "kareth"--to be cut off from one's people--include certain dietary laws); Id., Seder Mo'ed., Tractate Bezah (M. Ginsberg, trans. 1938)(limitations under which food must be prepared on festival days); Id., Seder Tohoroth, Tractate Kelim (W. Slotki, trans. 1948)(laws of uncleanness as they affect utensils), Tractate Tohoroth (W. Slotki, trans. 1948)(laws of cleanness concerning foods and liquids and their preparation and consumption), Tractate Ukzim (S. Lehrman, trans. 1948) (cleanness of roots, stalks, and husks of plants). It is likewise a major topic in the Code of Maimonides and the writings of other Jewish scholars. See The Code of Maimonides (Mishnah Torah), Book Five, The Book of Holiness, Treatise II, Forbidden Foods (Yale Judaica Series, Rabinowitz and Grossman trans. 1965), Book Ten, the Book of Cleanness, Treatise VI, The Uncleanness of Foodstuffs (Yale Judaica Series, Danby trans. 1954); II Maimonides, The (Negative) Commandments,172-191, pp. 167-187 (C. B. Cheval trans. 1967). See also S. Ganzfried, Code of Jewish Law

(Kitzur Shulhan Aruh), vol. I, chapts. 38, 46 (Goldin trans. 1961); G. Horowitz, The Spirit of Jewish Law 115-116 (1953).

As the rabbinic literature makes clear, the dietary laws are to be strictly observed, as part of the Biblical command to "In all thy ways acknowledge Him." Proverbs 3:6. Uncontroverted testimony as well as the literature establish that the dietary laws are to be suspended by the orthodox faithful only when one's life is in danger. See, e.g., S. Ganzfried, Code of Jewish Law, vol. II, chap. 92, vol. IV, chapt. 192 (Goldin trans. 1961); I. Maimonides, The Book of Knowledge (Mishnah Torah) 5:6, 40b (M. Hyamson ed. 1965); I. M. Hacohen, Machne Yisroel, chapt. 8, 58 (trans. on file by M. Tendler, 1943 ed.)(obedience to dietary laws required of Jewish soldiers in Russian and Polish armies).

An inability to observe the Jewish dietary laws would seem to strike an observant orthodox Jew in a way similar to the way a defilement of communion would strike a devout Catholic. In fact, the great discipline demanded of an observant Jew seems similar in spirit to the orderly and disciplined daily ritual of prayer, meditation, mass, and communal meals of monks in cloisters, although, of course, the former group is immersed in earthy life and the latter separated from it. See, e.g., Pfeiffer, The

Books of the Old Testament 60 (1965).

This brief discussion of theological and historical background obviously has some bearing on the issue of defendant's bona fides. He appears to be almost possessed with the problems of the Jews as a people. Such a dedicated Jew would fear that his own failure to obey God's commands as to kashruth might constitute a breach of the covenant that might affect the promised land and have grave consequences to himself.

III. THE LAW

A. Jurisdiction

1. Power of Court to Make Recommendations on Conditions of Incarceration

The government concedes that the court has jurisdiction to make recommendations concerning conditions of incarceration. Such recommendations are routinely sought by the Federal Bureau of Prisons. See Bureau of Prisons Form A.O. 235 (11/74). A court's recommendations are generally followed. Thus, the court, at the least, has power to make recommendations to the prison authorities concerning conditions for the defendant's incarceration, including availability of kosher food.

Judges should take their responsibility to make such recommendations seriously. They have a close relationship with, a responsibility for, those they send to prison. They

want to ensure that those they sentence are not mistreated or deprived of their dignity and opportunity for rehabilitation. But cf. United States. v. D'Allesandro, -- F. 2d -- (2d Cir. 1975)(limited power of nisi prius judges to correct abuses by Parole Board of prisoners they have sentenced). Stripping a prisoner of the opportunity to maintain and strengthen his religious and ethical values would be so counterproductive of good sentencing principles as to require reconsideration of incarceration. See, e.g., A.B.A. Project on Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures 54-55, 61-63 (Approved Draft 1968); Barnett v. Rogers, 410 F. 2d 995, 1002 (D.C. Cir. 1969).

2. 28 U.S.C. § 2255.

A more precise basis for the court's jurisdiction is found in 28 U.S.C. § 2255. The defendant's petition to vacate his sentence, in that it unconstitutionally denies him his First Amendment privilege to limit his diet to kosher food, may properly be considered as a motion under 28 U.S.C. § 2255. That statute permits a federal prisoner to move at any time to vacate or correct his sentence upon the ground "that the sentence was imposed in violation of the Constitution or laws of the United States. . . ." See Hill v. United States, 368 U.S. 424, 426-27, 82 S. Ct. 468, 470, 7

L. Ed. 2d 417 (1962). The third paragraph of the statute deals with the action to be taken on such a motion:

> "If the court finds. . .that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or. . .correct the sentence as may appear appropriate." (Emphasis supplied.)

Section 2255 was designed to revise the procedure by which federal prisoners seek the relief of habeas corpus. It was intended "to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." Kaufman v. United States, 394 U.S. 217, 222, 89 S. Ct. 1068, 1071, 22 L. Ed. 2d 227 (1969). This court, having sentenced the defendant, may at any time review the sentence it imposed and correct the denial of a constitutional right violated by the imposition of the sentence itself. The statutory right under section 2255 is not merely to a federal forum but to "full and fair consideration of constitutional claims." Kaufman v. United States, supra, 394 U.S. at 228, 89 S. Ct. at 1075. Cf. S. Fuld, Writ of Error Coram Nobis, 117 N.Y.L.J., Nos. 130-132, June 5, 6, 7 (1947); 28 U.S.C. § 1651.

Habeas corpus, which section 2255 incorporates, "is not a static concept, but expands and develops as new problems arise." Price v. Johnson, 334 U.S. 266, 282, 68 S. Ct. 1049, 1058, 92 L. Ed. 1356 (1948). It has been utilized in claims involving rights of members of the armed forces seeking release (In re Tarble, 13 Wall. (80 U.S.) 397, 20 L. Ed. 597 (1872); Cox v. Wedemeyer, 192 F. 2d 920 (9th Cir. 1951)); concerning child custody (Ex parte Beaver, 271 F. 493 (D. Ohio 1921)); concerning rights of aliens detained by authorities or a carrier (Chin Yow v. United States, 208 U.S. 8, 28 S. Ct. 201, 52 L. Ed. 369 (1908); United States ex rel. Boulbol v. Fielding, 175 F. 290 (E.D.N.Y. 1909)); and concerning rights of mental patients (Dorsey v. Gill, 148 F. 2d 857 (D.C. Cir.), cert. denied, 325 U.S. 890, 65 S. Ct. 1580, 89 L. Ed. 2003 (1945); De Marcos v. Overholser, 137 F. 2d 698 (D.C. Cir.), cert. denied, 320 U.S. 785, 64 S. Ct. 157, 88 L. Ed. 472, reh. denied, 320 U.S. 813, 64 S. Ct. 204, 88 L. Ed. 491 (1943); Shields v. Shields, 26 F. Supp. 211 (D.C. Mc. 1939)). The Supreme Court has spoken of it in the following terms:

> "[I]t is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of the law . . . .'
>
> We accordingly look to the usages and principles which have attached themselves to the writ of habeas corpus down through the years to the present time. The historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause. The most important result of such usage has been to afford a swift and imperative remedy in all cases of illegal restraint upon personal liberty . . . .
>
> Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ . . . . Justice may on occasion require the use of a variation or a modification of an established writ."

Price v. Johnson, 334 U.S. 266, 282-284, 68 S. Ct. 1049, 1058-1059, 92 L. Ed. 1356 (1948).

Section 2255 can be used only to attack the denial of constitutional rights at the imposition of a sentence, not those which arise afterwards upon its execution. The latter class of violations must be rectified by a habeas corpus or other form of petition in the district of confinement. Mordecai v. United States, 421 F. 2d 1133, 1139-40 (D.C. Cir. 1969), cert.

denied, 397 U.S. 977, 90 S. Ct. 1098, 25 L. Ed. 2d 272 (1970); McCune v. United States, 374 F. Supp. 946 (S.D.N.Y. 1974). An example of the kind of case where venue would lie in the district where the prison is located is a denial of First Amendment mailing privileges by the incarcerating institution. Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).

The defendant's application falls within the scope of section 2255 because it was obvious to the sentencing court at the time of sentencing that defendant's dietary requirements, if ignored, would create a serious constitutional issue. The government has conceded that no federal prison will provide defendant with kosher food. Thus the imposition of the sentence, if the defendant would be deprived of his First (religious) or Eighth ("cruel and unusual" punishment) Amendment rights, would be unconstitutional.

It is not necessary to go through the formality of transporting the defendant to the prison where he will be deprived of a protected right if it is clear from the time of imposition of sentence that he will be deprived of that right. The Constitution does not require litigants to subject themselves to possible irreparable harm before

seeking relief from an allegedly unconstitutional practice. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 536, 45 S. Ct. 571, 574, 69 L. Ed. 1070 (1925)("Prevention of impending injury by unlawful action is a well-recognized function of courts of equity").

Under section 2255 the sentencing court must determine whether a hearing is required. Mirra v. United States, 379 F. 2d 782 (2d Cir.), cert. denied, 389 U.S. 1022, 88 S. Ct. 593, 19 L. Ed. 2d 667 (1967). Because the petitioner raised a material issue of fact on a claim of constitutional dimensions respecting the conditions of his sentence, he was entitled to an evidentiary hearing before the sentencing court. United States v. Carlino, 400 F. 2d 56 (2d Cir.), cert. denied, 394 U.S. 1013, 89 S. Ct. 1630, 23 L. Ed. 2d 39 (1968); United States v. Tribote, 297 F. 2d 598 (2d Cir. 1961).

Effective judicial administration supports the conclusion that defendant's claims should be heard by the sentencing court. As will be noted below, an important issue of fact is whether the application is made in good faith. Since this court has had the defendant before it on many occasions and is familiar with the presentence report, the decision on dietary needs can be made more readily here than in any other court.

3. 28 U.S.C. § 1361

Jurisdiction also lies pursuant to 28 U.S.C. § 1361 granting "district courts jurisdiction of any action in the nature of mandamus to compel an officer. . .of the United States to perform a duty." See Cortright v. Resor, 447 F. 2d 245, 250-251 (2d Cir. 1971), cert. denied sub nom. Cortright v. Froehlke, 405 U.S. 965, 92 S. Ct. 1172, 31 L. Ed. 2d 240 (1972).

Defendant's case, for purposes of section 1361, is "ripe," since the harm threatened is both imminent and irreparable. See Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). Thus there is no need to wait until the defendant approaches death through starvation in whatever institution the government places him.

Venue is proper under section 1361 since defendant is currently under this court's jurisdiction and control and "the cause of action arose" in this district and because the defendant resided in this district before incarceration. 28 U.S.C. § 1391(e). Cf. Ott v. United States Board of Parole, 324 F. Supp. 1034, 1037 (W.D. Mo. 1971)(for venue purposes of section 1391, a prisoner "resides" in the district of his domicile previous to incarceration--which in the instant case is Brooklyn). In any event, no objection to venue, but only to jurisdiction, has been made. See 28 U.S.C. § 1406(b).

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Defendant is being held in a Community Treatment Center in Manhattan, across the river from this courthouse, because the Eastern District holds no comparable federal institution. It would be absurd to suggest that because of this accident of institutional location a Southern District Court, unfamiliar with this defendant, had to decide the case. The court would be doing a disservice to another member of the federal bench if it allowed the jurisdictional objection raised by the government to enable it to foist the difficulties presented by this defendant off onto another judge.

4. Federal Rules of Criminal Procedure, Rule 35

The defendant also contends that the court has jurisdiction to evaluate his claim of a right to kosher food because of Rule 35, permitting the sentencing court to modify a sentence. See Fed. R. Crim. P. 35. Rule 35 allows a court to reduce a sentence or correct an illegal sentence within 120 days of sentencing.

The government argues, however, that Rule 35 was not intended to apply to sentences imposed for a violation of probation pursuant to 18 U.S.C. § 3653, which provides, in part, that "the court may revoke the probation and require [the probationer] to serve the sentence imposed, or any lesser sentence. . . ." The government reasons that the

last sentence of Rule 35 ("The court may also reduce a sentence upon revocation of probation as provided by law") suggests that the reduction of a sentence pursuant to section 3653 amounts to a Rule 35 motion, and no further such motions may be heard if 120 days has run from the original date probation was imposed. This interpretation would prevent the court from reducing inappropriate probation violation sentences via Rule 35, depriving the courts and defendants of an important remedial tool. The court, however, need not decide this issue since there are other bases of jurisdiction.

The fact, as the government suggests, that the defendant may have abused his privileges in the Community Treatment Center by utilizing some of the time set aside for prayer or meals for secular purposes is not dispositive of the serious constitutional issues this court must consider. No ruling is required on whether these claims, if supported, may bear on the administrative determinations made by the Bureau of Prisons in controlling the defendant during his term of incarceration.

The government is entitled to make some effort to determine the sincerity of religious beliefs where obligations and rights flow from that determination. Greenawalt, Book Review, Konvitz, Religious Liberty and Conscience: A

Constitutional Inquiry, 70 Colum. L. Rev. 1133, 1135-1136 (1970). But such inquiry must proceed cautiously since the state should generally avoid placing itself in the position of deciding which religious claims are meritorious. See United States v. Ballard, 322 U.S. 78, 86-87, 92-95, 64 S. Ct. 882, 886-887, 889-890, 88 L. Ed. 1148 (1944); M. Konvitz, Religious Liberty and Conscience: A Constitutional Inquiry 27-50 (1968).

B. CONSTITUTIONAL REQUIREMENTS

1. General Framework

Prisons are located at a unique area of tension between the establishment clause and the free exercise clause of the First Amendment. The state, through the establishment clause, cannot require persons to worship in particular ways and cannot aid, endorse, or promote particular religions. School District of Abington, Pennsylvania v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962); Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947). But where the government has total control over people's lives, as in prisons, a niche has necessarily been carved into the establishment clause to require the government to afford

opportunities for worship. The free exercise clause embraces both the freedom to believe and the freedom to act according to those beliefs. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940). The government, in its control of prisons, is precluded from denying religious observance to inmates. Its obligation to permit religious observances is an extension of the position that no one can be burdened or punished by the state for having the "wrong" religious beliefs. Torcaso v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961)(public positions cannot be withheld from persons because of their religious beliefs). Thus, in the prison setting the establishment clause has been interpreted in the light of the affirmative demands of the free exercise clause.

The basic constitutional framework for cases concerning governmental regulatory infringement on religious practices was reviewed in Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). There the court dealt with a state's denial of unemployment benefits to a Seventh Day Adventist who refused to work, due to religious precepts, on Saturdays. The court found that:

> "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such."

374 U.S. at 402, 83 S. Ct. at 1793. It relied upon a consistent rejection of

> "challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' Braunfeld v. Brown, 366 U.S. 599, 603, 81 S.Ct. 1144, 1146, 6 L.Ed.2d 563. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."

374 U.S. at 403, 83 S. Ct. at 1793. The court concluded that a "compelling state interest" must justify any "substantial infringement of the appellant's First Amendment right," (374 U.S. at 406, 83 S. Ct. at 1795), and that, as noted above, the traditional measure for that interest required a substantial threat to public safety, peace, or order. It further commented that the compelling interest test would be met only if the religious practice created an "administrative problem of such magnitude" that it rendered proper statutory regulation unworkable. 374 U.S. at 409, 83 S. Ct. at 1796. (Emphasis added.)

This essential "compelling state interest" formula has been repeatedly confirmed. In Braunfeld v. Brown, 366 U.S. 599, 607, 81 S. Ct. 1144, 1148, 6 L. Ed. 2d 563 (1961), the court declared:

> "If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden [on the free exercise of religion] . may be characterized as being only indirect."

In Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 323, 89 L. Ed. 430 (1945), the court emphasized that, "[o]nly the gravest abuses endangering paramount interests, give occasion for permissible limitation" on First Amendment rights.

These broad principles apply to the religious rights of prisoners:

> "The state may restrict religious acts if it can be shown that they pose 'some substantial threat to public safety, peace or order' and that there is a 'compelling state interest in the. . .regulation'. . . . [P]laintiff's desire to practice his religion may be restricted only upon a convincing showing that paramount state interests so require."

Brown v. Peyton, 437 F. 2d 1228, 1231 (4th Cir. 1971)(rights of Black Muslim prisoner). See generally Cooper v. Pate, 378 U.S. 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964); Pierce v. LaVallee, 293 F. 2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F. 2d 196 (4th Cir. 1961).

Such cases must, of course, be read against the Supreme Court's acknowledgement that "[l]awful incarceration brings about the necessary withdrawal or

limitation of many privileges and rights." Price v. Johnson, 334 U.S. 266, 285, 68 S. Ct. 1049, 1060, 92 L. Ed. 1356 (1948). See also Sostre v. McGinnis, 334 F. 2d 906, 908 (2d Cir. 1964). Yet, the Supreme Court has also held that First Amendment rights may be curtailed only by the least drastic means. United States v. Robel, 389 U.S. 258, 268, 88 S. Ct. 419, 426, 19 L. Ed. 2d 508, 516 (1967); Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231, 237 (1960); Note, Less Drastic Means and the First Amendment, 78 Yale L. J. 464 (1969).

In addition to these First Amendment grounds, the Supreme Court has held that the Fourteenth Amendment precludes prison authorities from indirectly and unreasonably favoring practices of some religions over others by preventing its adherents from observing their religious requirements. See, e.g., Cruz v. Beto, 405 U.S. 319, 322 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263 (1972)(Buddhist prisoner must be allowed an opportunity to practice his religious faith comparable to opportunities allowed to prisoners of other faiths).

This approach is reflected in cases requiring prisons to contract to provide clergy of various faiths a comparatively substantial administrative burden. See Cruz v. Beto, 405 U.S. 319, 322 n. 2, 92 S. Ct. 1079, 1081 n. 2, 31 L. Ed. 2d 263 (1972)(while clergy need not be

provided to every sect "regardless of size", comparable opportunities for religious practices must be offered); Northern v. Nelson, 315 F. Supp. 687 (N.D. Calif. 1970), aff'd, 448 F. 2d 1266 (9th Cir. 1971)(prison that provides Protestant, Catholic, and Jewish clergy must provide Muslim minister on similar contractual basis); Kauffman v. Johnston, 454 F. 2d 264 (3d Cir. 1972)(prison made effort to secure the services of a Jewish rabbi for Jewish prisoners); Long v. Parker, 390 F. 2d 816 (3d Cir. 1968)(case remanded to determine whether prison's failure to provide Muslim minister constituted discrimination when other faiths were provided clergy).

In sum, the "compelling state interest" standard must be applied to provision of kosher food to Jewish prisoners in federal institutions. Failure to make such food available would be permissible only if providing it created a seriously disruptive administrative burden.

2. Cases on Rights of Jewish Prisoners

While we have found no cases deciding whether prison officials are compelled to provide kosher food to Jewish prisoners, there are peripheral decisions consistent with the general principles just discussed. For example, in Ho Ah Kow v. Nunan, 12 Fed. Cases 252 (Case No. 6,546) (Calif. C.C. 1879), Justice Field, acting as Circuit Justice,

found that a prison requirement that discriminated in effect against Chinese prisoners by requiring them to cut their queues was invalid as a "cruel and unusual punishment" and a discrimination in violation of the Fourteenth Amendment. In dicta, the court stated that a regulation forcing Jewish prisoners to eat pork would be "an offense against their religion," and under certain circumstances would be an invalid "special law," illegally discriminatory "in effect and operation." 12 Fed. Cases at 255.

Where a prison official failed to permit a Jewish inmate to attend religious services when he was confined in a close control unit, the court ordered the prison to provide special escorts and make such services available in view of the high importance the law places on the right to worship. Konigsberg v. Ciccone, 285 F. Supp. 585 (D.C. Mo. 1968), aff'd, 417 F. 2d 161 (8th Cir.), cert. denied, 397 U.S. 963, 90 S. Ct. 996, 25 L. Ed. 255 (1970). See also Wilson v. Beame, 380 F. Supp. 1232 (E.D.N.Y. 1974)(Constitution mandates that prisoners in segregation have access to communal religious worship, including a minyan (of ten Jewish adult males) where available). In Rockey v. Krueger, 62 Misc. 2d 135, 306 N.Y.S. 2d 359 (Sup. Ct., Nassau Co. 1969), the court noted that since orthodox Jewish prisoners were not required to shave beards on religious grounds, a Muslim prisoner would not be so required.

The Third Circuit came close to dealing with the issue of availability of kosher food in 1972. In Kauffman v. Johnston, 454 F. 2d 267 (3d Cir. 1972) a Jewish prisoner sought kosher food for the celebration of Passover, but since the holiday had passed, the court declared the case moot. In a related case, Kauffman v. Johnston, 454 F. 2d 264 (3d Cir. 1972), the court remanded to the district court a complaint by the same prisoner who sought an opportunity to observe Jewish religious holidays and to worship because the plaintiff "stated a cause of action cognizable under the Civil Rights Act." 454 F. 2d at 266. The court noted that the Jewish Welfare Board in Wilkes-Barre, Pa., some twenty miles from the Pennsylvania State Prison, provided kosher food for Jewish inmates through arrangement with the prison.

3. Cases on Muslim Dietary Requirements

The line of cases closest to the one before us concerns availability of pork-free foods to Black Muslim prisoners. The leading discussion is Barnett v. Rogers, 410 F. 2d 995 (D.C. Cir. 1969). The issue was whether officials of the district jail were constitutionally compelled to accommodate the dietary laws of the Muslim faith. In discussing the evaluative standard to be applied, the court protected the religious dietary requirements of the prisoners.

It stated:

> "To say that religious freedom may undergo modification in a prison environment is not to say that it can be suppressed or ignored without adequate reason. And although 'within the prison society as well as without, the practice of religious beliefs is subject to reasonable regulations, necessary for the protection and welfare of the community involved,' [Tony v. Parker, 390 F. 2d 816, 820 (3d Cir. 1968)] the mere fact that government, as a practical matter, stands a better chance of justifying a curtailment of fundamental liberties where prisoners are involved, does not eliminate the need for reasons imperatively justifying the particular retraction of rights challenged at bar. Nor does it lessen governmental responsibility to reduce the resulting impact upon those rights to the fullest extent consistent with the justified objective."

410 F. 2d at 1000-1001.

The court noted in Barnett "[t]hat penal as well as judicial authorities respond to constitutional duties is vastly important to society as well as the prisoner." 410 F. 2d at 1002. The case was remanded and the district court was ordered to inquire "whether the government purposes and operations responsible for [the dietary] impediments could feasibly be 'pursued by means that [less] broadly stifle fundamental personal liberties.'" 410 F. 2d at 1003. It suggested various administrative procedures that could be followed to protect Muslims' rights, including provision of non-pork substitutes and advance publication of menus to provide notice of pending pork meals. The D. C.

Circuit's test, squaring Sherbert with Supreme Court prison cases, then, was that a prison might reasonably regulate religious practices, but that it must make reasonable accommodations to such practices. This decision may be read as subjecting prison officials to something less than the "compelling state interest" test enunciated by the Supreme Court in Sherbert for the religious rights of the populace as a whole.

Other courts have taken slightly different tacks. In Ross v. Blackledge, 477 F. 2d 616 (4th Cir. 1973), the Fourth Circuit came closer to Sherbert when it relied upon a "paramount state interest" test. It declared:

> "[W]e held that the state may only restrict a prisoner's desire to practice religion 'upon a convincing showing that paramount state interests so require.' * * *Brown v. Peyton, 437 F. 2d 1228, 1231 (4th Cir. 1971). . . .While the decisions of prison officials are entitled to considerable weight, they are subject to judicial reviews 'to insure that the constitutional rights of prisoners are protected.'"

477 F. 2d at 618. The case was remanded for an evidentiary hearing to determine if "there is adequate nourishment in the pork-free foods currently available to the prisoners. . .and whether the state can establish an adequate interest for not providing some satisfactory form of alternative diet." 477 F. 2d at 619.

Battle v. Anderson, 376 F. Supp. 402, 427 (E.D. Okla. 1974), stated flatly that "food distribution practices which prevent Muslim inmates from adhering to their religious practices of abstaining from the consumption of pork and pork by-products" are invalid. 376 F. Supp. at 427.

> "Such practices cannot be squared with the First Amendment rights of the inmate and, on the basis of the record in this case, are an unconstitutional application of state power."

Ibid. The court enunciated a test similar to Sherbert when the religious practice presented no threat to order in the institution:

> "Where the precepts of a religious sect call for its adherents to engage in a religious practice which does not present a threat to the security, discipline and good order of the institution, the state has the burden of justifying policies or practices which prevent such inmates from engaging in such religious practices." (Emphasis added.)

Ibid. The court left unclear precisely what justification would be adequate, but cited cases requiring a compelling state interest.

One court provided some indication of what degree of administrative burden it viewed as justifying an infringement of religious rights. In Walker v. Blackwell, 411 F. 2d 23 (5th Cir. 1969), the court cited the compelling

state interest test as applicable to prisoners' religious rights. But it held that although there was no substantial burden caused to prisons by allowing a Passover Seder meal to Jewish inmates, providing a special diet to Muslim inmates after sunset during the thirty days of Ramadan, because of the administrative burden, security problems, and expense this would cause, was not required. See also on Muslim prisoner dietary requirements: Elam v. Henderson, 472 F. 2d 582 (5th Cir.), cert. denied, 414 U.S. 868, 94 S. Ct. 177, 38 L. Ed. 2d 117 (1973)(no showing that lack of special prison diet for Muslim prisoners has resulted in substantial deprivations); Abernathy v. Cunningham, 393 F. 2d 775 (4th Cir. 1968)(adequate non-pork nourishment was available to prisoners); X. (Bryant) v. Carlson, 363 F. Supp. 928, 930 (E.D. Ill. 1973)(sufficient alternative foods available); Northern v. Nelson, 315 F. Supp. 687 (N.D. Calif. 1970), aff'd, 448 F. 2d 1266 (9th Cir. 1971)(prison menu adequate); SaMarion v. McGinnis, 35 App. Div. 2d 684, 314 N.Y.S. 2d 715 (4th Dep't 1970)(Muslims should be provided whenever possible with pork-free meals, and when that is not practicable, alternative non-pork foods should be available).

A pattern emerges in the Muslim food cases. Courts cite a strong "compelling" test, but apply it with lesser strength to prisoners' rights to take account of seriously

disruptive administrative burdens. Put another way, the cases require the least denigration of the human spirit and mind consistent with the needs of a structured correctional society. This balance is in general accord with the Supreme Court's recent discussion of the appropriate standard for First Amendment rights in the context of prisons in Procunier v. Martinez, 416 U.S. 396, 406-408, 94 S. Ct. 1800, 1808-09, 40 L. Ed. 2d 224 (1974).

4. Application of Standards

While Muslim religious beliefs concerning diet can be satisfied simply by providing alternative non-pork foods, kosher dietary requirements cannot be satisfied quite so readily. Nonetheless, strong precedent for provision of kosher food is found in the Muslim food cases. And, balancing the more restrictive and burdensome orthodox Jewish requirements is the fact that there are but a handful of strictly observant Jews in the penal system as compared to the many adherents of the Muslim faith. Strong support is also found in the cases discussed above requiring prisons to undertake the substantial burden of providing clergy to represented faiths.

Under the precedents established by the Muslim dietary cases, at a minimum federal prisons must provide dietary alternatives to Jewish prisoners observing dietary

laws that would not violate kosher requirements--for example, certain fruits, acceptable breads, cheeses, tinned fish, boiled eggs and vegetables, supplemented by hot kosher pre-cooked frozen meals. These diet alternatives must supply adequate nutrition for a person who is to be incarcerated for a long period.

It would be satisfactory to allow local or national Jewish community groups to provide kosher foods to orthodox Jewish prisoners. Cf. Kauffman v. Johnston, 454 F. 2d 264 (3d Cir. 1972) (local community group provided kosher food to Jewish inmates of state prison); Stark v. Wyman, 59 Misc. 2d 504, 299 N.Y.S. 2d 686 (Kings Co. Sup. Ct. 1969) (while state welfare agency was not required to increase orthodox family's food allowance to cover more expensive kosher food, court noted that such assistance would be available through private community groups).

The testimony indicated that prisons could purchase, under their normal food requisitioning procedures, pre-prepared, frozen, foil-wrapped kosher meals accompanied by disposable eating utensils; they are readily available from a number of manufacturers with numerous distributorships around the country. Such frozen meals, the testimony showed, are now widely available on airplanes, trains, buses, in

hospitals, and at hotels and motels. These dinners could be prepared with virtually no administrative inconvenience by heating in regular prison kitchens. While the cost of these dinners would be somewhat higher than regular prison fare, the government does not contest the fact that only in the order of a dozen persons would have to be provided with such food, so that costs would not be significant. It is also worth noting that the Bureau of Prisons has traditionally had to provide numerous specialized diets in the medical treatment facilities that are a part of every prison.

A combination of these comparatively simple administrative procedures would result in a nutritionally sound diet consistent with kosher requirements with only minimal administrative inconvenience. The government has shown no serious, much less compelling, reasons why provision of a kosher diet for this defendant would affect prison security or discipline. Because solutions involving minimal administrative burdens are available, the court need not consider possibly burdensome solutions such as concentrating orthodox Jewish pr oners in one or two federal facilities where kitchens consistent with kosher requirements could be provided.

While the government has expressed a fear that if a kosher diet is provided prisons will be flooded with applications for it, the repetitive and spartan nature of such a diet under prison conditions would undoubtedly discourage those who are not sincere. Should the government be subjected to clearly spurious claims, it could ask for a showing of demonstrated adherence to, or belief in, orthodox laws. See United States v. Ballard, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944); Theriault v. Carlson, 495 F. 2d 390, 395 (5th Cir. 1974)(religious beliefs that are "obviously shams and absurdities and whose members are patently devoid of religious sincerity" are not entitled to First Amendment protection); M. Konvitz, Religious Liberty and Conscience: A Constitutional Inquiry 27-50 (1968).

However misguided and violent his past activities, the defendant is a religious person, an observant orthodox Jewish rabbi. To deprive him of opportunities to observe basic religious practices in light of his particular beliefs can only amount to a cruel and unusual form of punishment.

The facts in the recent case of United States v. Huss, -- F. Supp. --, Nos. 73-CR-24, 25 (S.D.N.Y. May 5, 1975), are somewhat different from the case before us. To the extent that the Huss decision is inconsistent with our legal conclusions, we most respectfully disagree with them.

IV. CONCLUSION

It would be more convenient for authorities if all people were the same in religion and outlook. There are many procrustean beds in today's world designed to reduce populations to mass conformity--interchangeable human beings, like spare parts in a machine. And, perhaps, the authoritarian regimes of tomorrow will be able to achieve such results through new developments in biology and psychology. When that end is achieved the American experiment of freedom--of recognition that each person should be able to achieve his own spiritual and religious peace by whatever means he chooses that do no harm--can be abandoned as unnecessary. Until that day, federal courts will, we trust, continue to do their duty in enforcing the United States Constitution.

> "It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is 'caught upon the broad shield of our blessed Constitution and our equal laws.'" [Citing: Fossat's Case, 2 Wall. 703 (69 U.S. 703)].

Ho Ah Kow v. Nunan, 12 Fed. Cases 252, 256 (Case No. 6,546) (Calif. C.C. 1879)(Field, Circuit Justice).

In Mr. Justice Jackson's words,

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943). In this case the Constitution requires that the religious needs of the defendant to practice an important tenet of his faith be respected.

The hearings and analysis of applicable law confirm that no irresolvable conflict exists between the rights of the defendant and the practical needs of the correctional institutions. Nor does Jewish law require that the issue be posed in a way that prevents the just punishment of persons merely because they are orthodox Jews or members of some other faith that has special dietary or religious requirements. Defendant is constitutionally entitled to an order accompanying his sentence that allows him to conform to Jewish dietary laws. Without any undue inconvenience to the correctional institution, through utilization of some of the suggestions already adverted to and others that were described at the hearings or that can be developed locally, the issue can be resolved as it

has been in cases in the past. The minor practical problems presented can be easily met if the government tries in good faith to do so.

Since this decision determines the rights of the defendant, the stay entered by this court requiring the government to keep defendant at the Federal Community Treatment Center in New York City is vacated. The defendant may be sent to an institution suitable to his needs and the requirements of the correctional service. The Federal Bureau of Prisons is directed to take precaution to accommodate the defendant's religious requirements in a manner not inconsistent with this opinion.

So ordered.

Dated: Brooklyn, New York
May 7, 1975

U.S.D.J.

DEB:TRP:rap

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 205

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

MEIR KAHANE,

Defendant.

NOTICE OF APPEAL

71 CR 479

- - - - - - - - - - - - - - - - - X
- - - - - - - - - - - - - - - - - X

MEIR KAHANE,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

75 C 624

- - - - - - - - - - - - - - - - - X

S I R S :

PLEASE TAKE NOTICE that the UNITED STATES OF AMERICA hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of the order of the District Court (Jack B. Weinstein, U.S. District Court Judge) entered on May 7, 1975.

Dated: Brooklyn, New York
June 6, 1975

Yours, etc.,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for United States
of America
225 Cadman Plaza East
Brooklyn, New York 11201

By: _____
THOMAS R. PATTISON
Assistant U.S. Attorney
Deputy Chief, General Crimes
Section

TO: CLERK
United States District Court
Eastern District of New York

Barry I. Slotnick, Esq.
233 Broadway - 44th Floor
New York, New York 10007

A 206

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

- against - : MOTION FOR REDUCTION OF SENTENCE

MEIR KAHANE, :

71 CR 479

Defendant. :

----------X

Defendant, MEIR KAHANE, within the time provided under Rule 35 of the Federal Rules of Criminal Procedure, moves for an order reducing the sentence heretofore imposed upon him. As his grounds therefor defendant states as follows:

1. He heretofore pled guilty before this Court to Count 1 of a one count indictment charging a violation of 18 USC 371.

2. On July 23, 1971 this Court entered an order sentencing him to a five year suspended sentence, five years of probation and a $5,000 fine. As a special condition thereof, the Court added that defendant was to have nothing to do, directly or indirectly, with guns, bombs, dynamite or any other weapons. Additional special conditions were added by order of this Court after a hearing on May 2, 1972.

3. Following a hearing on February 21, 1975, this Court found that defendant had violated these special conditions and, therefore, revoked the probation granted and resentenced the

(16)

the defendant to imprisonment for one year.

4. In answer to a motion by defendant pursuant to 28 USC 2255, the Court investigated various conditions of defendant's incarceration and issued appropriate orders to insure that the religious beliefs and practices of the defendant would remain inviolate.

5. Subsequent to these orders, defendant was to be transferred to a minimum security institution where the remainder of this sentence was to be served.

6. Pursuant to Rule 35 of the Federal Rules of Criminal Procedure, this Court may within 120 days from February 21, 1975 reduce the sentence upon revocation of probation entered herein.

7. This Court is fully familiar with all the circumstances of this case up to this point, e.g. that the defendant is an ordained Orthodox Jewish Rabbi; that, in this light, defendant is guided and governed by stringent tenets of faith, and that to the defendant these tenets are tantamount to law; that defendant recognized and is charged with a responsibility to the needs and pleas of his co-religionists and congregants.

8. Further, this Court has been made aware, at the hearing upon revocation of probation held on February 21, 1975, of the integral role that defendant plays in the panische of Jewish life world-wide.

9. At said hearing the testimony of one LEAH SLOVIN

was heard. The witness, once an attorney in Riga, USSR (Latvia) and currently practicing her profession in Israel, testified that it was in 1969 that she, a Jewess, in a country oppresive of that class, first heard the name of the defendant. In cold, knowing testimony, the witness chilled the courtroom with personal observations of the threatened and persecuted existence of her co-religionists in Russia. She told of how they would listen to the short wave broadcasts -- BBS, VOA and Kol Yisroel -- and wonder why a world called "free" could not hear their cries for help or understand their imprisoned plight. Then, little by little, they did see that one small voice was being raised in their defense. The voice grew and was joined and carried on the breath of others. Soon, not a single week passed in which the Soviet Press did not deplore the actions of this brigand and his band. And not a single Jew in Soviet Russia did not recognize that out of a cacophony of neglect, only the defendant blew the clear, crisp trumpet of freedom. More exactly, the witness likened the defendant to the drum -- the pacesetter of a giant orchestra. She believed that without this drum her own daughter would today still be living under the thumb of Soviet oppression. The witness closed with a warning that to jail the defendant would only bring "moral shock" to her Russian compatriots (Jewish and Gentile alike), and "great satisfaction" to those who ruled in disregard of religious liberty.

10. This witness and others who followed her had the

cumulative effect of indicating to this Court that not only was the defendant of prime importance in the identification of the predicament of Soviet Jewery as a vital problem (one worthy of the attention of the mainstream of Jewish activism and philanthropy), but was, in fact, a galvanizing force for both those in distress and those who have hastened to their rescue. The hopes and aspirations of these twin constituencies rely on the continued existance and vitality of the defendant as leader, advocate, teacher and friend. Incarceration has tempered these roles with the stain of impotency. Those in Russia with little raw material with which to foster understanding of this Court's actions can only view the continued incarceration of the defendant as mute testimony to the disturbing new attitude of America in the shadow of detente. Once again, Jews, this time in Russia, feel like the expendable pawns in a global chess game. This office has been informed that Soviet Jews have learned of defendant's current punishment and have viewed the same with both confusion and pain. Surely, this must be added into the balance when weighing the value of defendant's continued incarcera ion.

11. Behind every public image there is the personal man. Quite often, one who is constantly in the public eye must sacrifice his private needs and desires to a greater mission. This does not, however, make them any less viable. This Court in ruling upon the motion herein, as essentially a plea for leniency should weigh the personal background of the defendant. The defendant is a husband

and father; he has a family. They live many miles away in Israel and, therefore, it makes it impossible for this Court to enable the defendant to see them within the short periods of time customarily allowed for religious holidays. Fast approaching (September 9, 1975) is a period of time which traditionally among the Jewish people is a time for introspection, repentence, reaffirmation and rededication. It is a time that is spent in prayer with one's family. Foods, customs and this supporting web of family and friends shoar up a life style and traditions centuries old. If the Court does not grant the motion herein the defendant will have to spend the Rosh Hashona - Yom Kippur (High) holidays away from his wife and four children. This was the case during the Passover holidays. It has been too long a time since he has seen them. This would be a fitting time for the Court to exercise the benificent hand which Rule 35 allows.

12. At the present time the government is not providing the defendant with kosher food as ordered by this Court. Defendant instead is securing his own kosher food. Most important this points up a continuing and conscious policy of the government whereby defendant is denied elementary religious freedoms. A case in point would be the events surrounding the Jewish holiday which just passed, i.e. Shavuos. It was then that defendant, knowing that he could not, under the laws of his faith, purchase kosher food during the holidays and the Sabbath which immediately followed them turned to Warden Walsh. The defendant informed

Warden Walsh of the problems which the upcoming holiday would cause. Where the facility where defendant is currently being held did not have (and does not have) kitchen facilities. Warden Walsh suggested that the defendant spend the mealtimes during holiday period eating hard boiled eggs in his room. The Warden refused to allow the defendant every time to leave the facility for proper observation of the holidays. In desperation the defendant called counsel and informed counsel of his plan to walk to the Lower East Side, on a day by day basis, to eat and worship with friends. Clearly, this refusal was ludicrous in the light of the fact that the Bureau of Prisons has seen fit to allow the defendant seven hours of unsupervised freedom a day. Unless this Court views a reduction of defendant's sentence with kindness, there is good reason to believe that incidents such as this will continue into and through the most holy holidays to come.

12. Examination of the crimes involved herein point up the desireability of granting defendant's motion. The original plea of guilty was to the crime of throwing a Molotov cocktail into an empty swimming pool for the purpose of depicting the effect and danger of Radical Group Activity. The immediate violation of the special condition of probation upon which defendant currently stands incarcerated is for an act for which the sentencing court in Israel gave the defendant a suspended sentence. The Israeli Court granted the suspended sentence in consideration for

the defendant's motivation, which it ostensibly found supporting. One of the crimes was "Attempting to Harm Foreign Relations". This is in the nature of a crime against the State and has no parrallel in American law. The defendant was found not guilty of the attempted conspiracy to commit various acts of violence. In reviewing the facts as just outlined a New York State Judge felt that sixty days of a concurrent nature would be punishment enough in keeping with the tenor of the crime.

14. The conditions of defendant's incarceration defy basic elements of Equal Protection. Defendant apparently cannot be eligible for rehabilitation programs and cannot avail himself of parole. In fact, defendant is receiving what this Court can only view as "reverse" special treatment. Whereas any other defendant with the same background as this one would have most likely been a subject for parole at this point in his incarceration, defendant has been denied this right. At all points during his incarceration defendant has acted properly and has been in all respects a most model prisoner. Were it not for the actions of the Bureau of Prisons defendant would be spending the summer in a teaching program instructing children in Bible and related subjects. No doubt at this juncture one may only view the continued incarceration of the defendant as senseless, meaningless and a tragic waste of talent and ability.

15. At the time that the Court revoked defendant's probation it recognized that such action was predicated on a need to uphold the vitality of the probation system. After four

months of incarceration and viewing defendant's actions and demeanor, this Court should rest assured in the knowledge that this system, so important to our criminal rehabilitation system, has not only been perpetuated but embellished by the actions of the defendant. The only party which could benefit from the defendant's continued incarceration is that of the Soviet government. This, of course, would be to the lasting detriment of all of Soviet Jewery, and be the muting of an unique and an important voice in the cause of freedom.

16. In reviewing the circumstances of this case, it is hoped that the Court will agree that no further purpose is served by defendant's continued incarceration and that the record of this case indicates that a reduction of sentence would be in the interests of justice.

WHEREFORE, defendant prays that the relief requested herein be granted.

Dated: New York, New York
June 11, 1975

Yours, etc.

BARRY IVAN SLOTNICK
Attorney for Defendant
Office and P. O. Address
233 Broadway
New York, N. Y. 10007
(212) 233-5390

A 214

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
JUN 18 1975
TIME A.M.....
P.M.....

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UNITED STATES OF AMERICA :

-against- :

MEIR KAHANE, :

Defendant. :

----------x

71-CR-479

United States Courthouse
Brooklyn, New York

June 17, 1975
10:00 o'clock a.m.

B e f o r e :

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

HENRY SHAPIRO
OFFICIAL COURT REPORTER

I hereby certify that the foregoing is a true and accurate stenographic notes in this proceeding.

Henry Shapiro
Official Court Reporter
United States District Court for the Eastern District of N.Y.

A 215

Appearances:

DAVID G. TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York

BY: THOMAS PATTISON, ESQ.,
Assistant United States Attorney

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Attorney for the Defendant

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THE CLERK: United States of America versus Meir Kahane.

THE COURT: Call Mr. Slotnick. Find out where he is so we may move ahead.

. . .

MR. SLOTNICK: Good morning, your Honor.

THE COURT: Good morning.

THE CLERK: Please be seated.

MR. SLOTNICK: As your Honor knows, I have made an application pursuant to Rule 35 on behalf of the defendant and ask that the Court in its discretion reduce or modify the sentence pursuant to statute, hoping today brings the final chapter of United States of America against Meir Kahane under number 71-CR-479.

As your Honor will recollect, there was a stirring and moving hearing held with respect to the probation violation. Immediately thereafter your Honor pronounced sentence. Since that time many things have occurred. I would like to get to what has happened before we get to what lies in the past.

The Court has been inundated, I would dare say, with hundreds of letters by people in the community who have expressed their great problems with regard to your Honor's sentence. The defendant

has spent four months in jail -- it will be four months and several days.

I have had a personal experience since the sentence in observing the defendant more than I had ever observed him before, because to be frank he is not the easiest client for one to have in the world. He has been taken up with many things that he believes to be his calling.

Perhaps the Court has an interest, because I believe it has received letters from people in my community who saw him during the last two days of the Passover holiday, when your Honor so kindly allowed him to spend the holiday in my custody. He spent it at my Rabbi's home. I think the reaction to Rabbi Kahane is interesting. When he first appeared -- there being no advance publicity -- when he first appeared most of the congregation shook their heads and came over to me and said, "Who needs that man here?" The next day the Rabbi asked him if he would speak. He spoke for one and a half hours. He then spent the next day and a half totally in the synagogue. May I say I have never spent so much time in the synagogue in my life as I did then, because I felt it was incumbent on my behalf to be there. He spoke to these people and the terrible and wrong

impression and image that he has given everyone was, at least to the community, vitiated and looked aside.

Rabbi Kahane had paid very dearly for many of the things that he has done. I believe your Honor knows that he was very instrumental with regards to the safeguarding of people in the streets of Brooklyn during a certain period of time. Your Honor may know and it is my contention that the issue of Soviet Jewry, which is now a very, very highlighted issue, was one that was brought about solely and strictly by this man's continued pursuit in behalf of Jews in the Soviet Union.

Your Honor also knows that he moved and had taken his wife and children to Israel, and I would like to give your Honor a bit of the story of Rabbi Kahane that your Honor could not possibly know. As he sat in my home for the last two days of the Passover holiday, he took out of his pocket a letter written in Hebrew, which I could not read nor understand, unfortunately, and he said, "It's a letter from my son."

I said, "What does it say?

"Well, it is an eight-year old's letter."

I said, "What does it say? Would you tell me so I know what an eight-year old in Israel writes to

a father who is now spending a very important holiday away from his family."

It said, "Daddy, why don't you run away and come home? Why do you have to go to jail?"

Needless to say, that would have a very great effect upon any individual. I watched the young children of my congregation and indeed the adults who asked the simple question, "Rabbi, why do you have to go to jail?"

I am not pleading for him on the fact that he has a title of "Rabbi". That does not make him to any great extent any more special than anyone else. But what I am saying is that there are mitigating circumstances at this time.

I will end with the following:

I met someone in an elevator yesterday in one of the courthouses, "I hear you are making an application?"

"Yes."

He looked at me and he said, "I hope so," and with that I go back to the question of hope that Dr. Korman testified to at the hearing in his completely spontaneous answer with respect to the difference in hope between his cancer patients and those that he saw in the Soviet Union. He said that

at least as to his cancer patients when they had the question of fear, at least when they showed fear, they showed hope.

I think the final offshot and perhaps the greatest problem that I as a human being have is the fact that the individuals and peoples in the Soviet Union who are aware of, as we sometimes call him, The Crazy Rabbi. Some of their hopes, whether probable or improbable, upon him have now been severely -- severely distressed. There were things that occurred after his incarceration which may or may not have occurred anyhow. But I think they again overlie the end and final issue. This man is a man who speaks for a certain group. He is at this point in his life a political figure, he is a columnist. He is well-known and perhaps it might be said of Rabbi Kahane that those in other places are dependent upon him.

I would ask your Honor to reconsider the sentence that he imposed upon the Rabbi on the day of the probation violation. I would ask your Honor to modify -- I would ask your Honor to release him.

THE COURT: What is the Government's position?

MR. PATTISON: Your Honor, I must say at this time I believe that the motion is late, first of all. I believe as the Court knows, a notice of appeal has

been filed. The Court of Appeals has power over this case now.

THE COURT: You mean I have no authority at the moment?

MR. PATTISON: That is correct, both on the fact that one hundred and twenty days have in fact passed, that the Court when it sentenced on 2/21 of this year lowered the sentence from five years down to one. Certainly another one hundred and twenty days cannot then start again giving a total of more than the law in fact calls for -- more time that is.

Secondly, as I said earlier, the Court of Appeals has power over the case now -- has jurisdiction.

THE COURT: It is no longer in this Court, you mean?

MR. PATTISON: That is correct.

THE COURT: You may be right.

MR. PATTISON: Although the appeal is technically under the civil side, that is only because the Clerk's office has no other means of in fact handling a notice of appeal. It must be either/or.

THE COURT: Are you removing the entire file up to the Second Circuit?

MR. PATTISON: Well, we have on our papers noted the related case in 71-CR-479, and made it clear that the caption of the Court's order should be the vehicle from which the appeal is made. In a practical sense there is no way that the Clerk's office can actually handle it this way, therefore, we have elected to have the major caption the actual civil title, but in fact I think both cases are up before the Court of Appeals now.

Even if that notice of appeal had not been filed, as we argued earlier, a 35 motion does not lie now. One hundred and twenty days has in fact passed. The only other time at which a Court may lower the sentence did come and was used and it has passed. Other than that, without getting to the merits, I feel that the Court does not have the power at this time.

If we got to the merits I feel that only thing that I would like to point out, which I feel the Court should take notice of, is on Page 6 of the instant motion papers, Point number 14. I believe the way the various crimes are in fact styled -- characterized, is an affront to the record here.

Beyond that I have nothing more.

MR. SLOTNICK: Your Honor, with regard to the

appeal:

I would like to see a copy of the notice of appeal. I have not seen one to date nor has my office received one.

MR. PATTISON: It was mailed.

MR. SLOTNICK: Unfortunately, it has not arrived. I wonder if I may look at a copy?

MR. PATTISON: I believe a copy is in the file. Proof of mailing should be there also.

(Document handed to counsel.)

MR. SLOTNICK: Thank you, your Honor.

Firstly, before we get to that, it is my understanding of Rule 35 that within one hundred and twenty days from the date of sentence -- and we did take the date of sentence to be February 21st, 1975 -- we'd suggest within one hundred and twenty days pursuant to statute the Court has jurisdiction to review.

Now, if the Government takes an appeal and that would cause the one hundred and twenty days to pass, certainly the defendant would be losing a basic right pursuant to statute. The Government can always take an appeal and the question comes down to whether that would be within the proper vein. I, number one, suggest to the Court that taking an appeal within the

first one hundred and twenty days has no effect on Rule 35. I suggest if your Honor feels that it does and I cannot, that the Government's appeal at this point is from each and every part of the order entered on May 7th of 1975 having to do with the defendant's rights to have kosher food and other religious functions.

I think the Government's first argument is an incorrect one. I do not think their notice of appeal defeats a defendant's right for review of his sentence, nor do I think the notice of appeal is addressed towards the sentence. I do not think it would remove jurisdiction, because it would simply impede a defendant's right to have that review as set forth by the statute.

The second argument of the Government, which is rather an interesting argument, that the Court has no jurisdiction over the defendant after a sentence as the result of a revocation of probation. We have presented to the Court, naturally, memoranda with regard to that at the prior occasion when there was some question as to whether the kosher food issue could be looked at pursuant to Rule 35 or whether there was other areas that the Court can rule on. I frankly indicated to the Court that I thought not only

could it look at it pursuant to Rule 35, and the Court suggested Rule 2255, and I suggested mandamus, and I thought there was a basic issue that it could be resolved on many issues, your Honor presented a learned and I think a correct opinion that the Government has appealed from not having to do with the sentence. The only case that I have been able to find, either way, and I think the Government has found no other cases with regard to a Rule 35 attaching to a probation violation, was the case in which Chief Judge Becker of the Western District of Missouri in United States of America against Fitzgerald in dictum stated:

"After a revocation of probation he would look at the defendant's sentence and also would include the possibility of a reduction pursuant to Rule 35."

I think the rule is clear on its face the Court may reduce a sentence upon revocation of probation as provided by law. I do not know of any statute of the United States that pre-empts or supersedes Rule 35. Therefore, I think your Honor has total jurisdiction.

MR. PATTISON: May I be heard?

THE COURT: Yes.

MR. PATTISON: First of all, if a motion could

have been made under this rule back in 1971 -- which I assume that it could have been -- although no jail term was imposed then, certainly there is no authority for a second time under the rule. The rule does not go out of effect and then come back into effect at any later time. I believe where the rule calls for the lowering, changing, modification of a sentence after a hearing violation that was done -- the fact that it was done on the same date that the violation was found, does not matter. The fact is that it was in fact done.

Also, I would cite primary authority here, the opinion of the Court entered on May 7th in which the Court impliedly agrees that Rule 35 is not timely at this time. That is to be found on Page 25 of the Court's opinion of May 7th in which this process had been thought of, considered as possibly being the vehicle for the prior motion, but the Court felt that it would not have to reach that point ultimately, but I think a fair reading of Page 25 and 26 does indicate that a 35 motion was not timely then nor is it now.

THE COURT: It certainly is a serious question and it would be helpful to get guidance from the Court of Appeals.

In view of the Government's position that the appeal has in effect removed the file and disposed this Court of any power over the case pending the appeal, I will deny the motion on two technical grounds:

That this Court has no power during the pendency of the appeal.

I think that is somewhat doubtful, because I believe the kosher food issue is collateral to the main point from which the appeal is now being taken. Production is sought not on the kosher point issue, but on the one he was sentenced.

I also deny it on the ground that there is no power under Rule 35.

The hope is that defendant will cross-appeal from these independent denials, since the Court is not exercising its discretion in view of the Government's position that there is no power here.

You can get that clarified.

Are you expediting this appeal?

MR. PATTISON: Yes, your Honor.

THE COURT: As I understand the matter, despite my order of May 7th, the Government has not followed it. I ordered you, on May 7, to supply the defendant with kosher food. As I understand it, you

have refused to comply with the Court's order.

MR. PATTISON: Your Honor, the order was:

Number one, to transfer him to a particular site which the Bureau of Prisons saw fit to choose and --

THE COURT: Has the Bureau of Prisons chosen a community treatment center as the place to serve his sentence?

MR. PATTISON: In light of the second part of the Court's order --

THE COURT: Is he being supplied with kosher food?

MR. PATTISON: Yes.

In effect, they are by allowing him to purchase whatever food he would want.

THE COURT: I must say, I do not think that is in the spirit of the Court's order or complies with the terms of it. He is apparently the only prisoner in the United States who is compelled to buy his own food or starve.

MR. PATTISON: I believe all of the other prisoners there buy their own food.

THE COURT: Does he get an allowance?

MR. PATTISON: Yes, he does.

MR. SLOTNICK: He does not. He has been

refused. He has requested of Warden Walsh that he receive an allowance to purchase food and that has been refused.

THE COURT: Regular prisoners who are in a community treatment center, not including those on probation who serve night sentences, but regular prisoners who use the community treatment center by assignment of Correction, get an allowance for food, as I understand it.

MR. PATTISON: This is the first that I have heard that he does not. I will find out as soon as I leave here. I feel that he should, of course.

Beyond that, assuming that that can be changed, rectified, I will do everything that I can to see that it is done.

Beyond that, the Government's action has been totally in accord with the order of the Court -- the spirit of the Court order.

THE COURT: All right, if they have been, fine.

MR. PATTISON: To transfer him to any other place, when the record is crystal clear that they cannot provide him kosher food --

THE COURT: If you have been complying, fine. I am not conducting a hearing. It was my impression that he was not getting an allowance.

MR. SLOTNICK: Correct, your Honor.

THE COURT: The Government was refusing to supply him with food directly or indirectly. If that is correct, you are not complying with the order. If you are, you can go ahead and treat it as you please, because the matter should be expedited.

Anything further?

MR. SLOTNICK: Would your Honor endorse an order on the back of the papers I presented to the Court, so that they can be forwarded to the Court of Appeals with respect to the cross-appeal denying my application?

THE COURT: I think you should submit an order. You have a transcript here. The Government may want to have it transcribed in view of this discussion.

MR. PATTISON: Yes, we will.

THE COURT: Thank you, gentlemen.

MR. SLOTNICK: Thank you.

MR. PATTISON: Thank you.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 5th day of August 19 75 he served ~~a copy~~ two copies of the within

Appellant's Appendix

by placing the same in a properly postpaid franked envelope addressed to:

Barry I. Slotnick, Esq.
233 Broadway
44th Floor
New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez

LYDIA FERNANDEZ

Sworn to before me this

5th day of August 19 75

Irene B. Cohen (Bevilacqua)

IRENE B. COHEN (BEVILACQUA)
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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A 231

UNITED STATES OF AMERICA, :

- against - : ORDER

MEIR KAHANE, : 71 CR 479

Defendant. :

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This cause having come on to be heard on defendant's motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, and the Court being fully advised, it is hereby

ORDERED, that the defendant's motion be denied on the independent ground that this Court has no power to consider the instant motion during the pending of the government's appeal pursuant to a Notice of Appeal filed on June 6, 1975 in related case Meir Kahane v. United States of America (75 C 624); and

FURTHER, the Court finds that Rule 35 is not applicable to a sentence rendered as a result of a finding of probation violation.

Dated: New York, New York
June 17, 1975

/s/ Jack B. Weinstein
U.S.D.J.

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